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THE TREBLE DAMAGE ACTION UNDER THE PRICE CONTROL ACT.

Arthur Basse, Jr.*

NEVER in all history has a single section of a statute begotten such a prodigious amount of litigation as the treble damage action provision for the enforcement of price control. Nor are these suits trivial in character. In one instance a recovery was sought in the amount of \$7,500,000.¹ Judged by any standard, the treble damage action is important. It is the purpose of this article, therefore, to examine it comprehensively and to evaluate it, restricting comment to this single phase of the far-flung price control program. As statutory analysis is the essence of the problem, the terms of the original statute,² as well as those of the later amendment,³ must be kept clearly in mind. They become the basis for any discussion of the issues involved while at the same time being the starting point for any attempt to evaluate the operation of the statute.

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¹ *Bowles v. American Distilling Co.*, civil action No. P. 307, U. S. Dist. Ct., So. Dist., Ill. The case was submitted to the jury on one issue only, to-wit: did defendant make the sales described in the complaint. The verdict was "yes." By stipulation, a judgment in favor of the plaintiff in the sum of \$200,000 and costs was entered and subsequently satisfied.

² 56 Stat. 33; 50 U. S. C. A. App. § 925(e).

³ 58 Stat. 640; 50 U. S. C. A. App. § 925(e).

I. PRELIMINARY CONSIDERATIONS

Just as in other fields of law, it is well for the aggrieved party to bring the treble damage action as soon as possible. Anticipatory remedies, such as injunction⁴ and declaratory judgment,⁵ are not within the scope of this article so, if they are eliminated, the rule that the action should be brought as soon as the cause of action accrues serves as a good rule of thumb. In that respect, it has been held that the cause of action accrues as soon as the consideration is actually paid or a consideration is given on which the person is unconditionally, absolutely, and immediately liable, as by the delivery of a negotiable promissory note into the hands of a third party for value, rather than when the consideration is contracted for but has not yet been paid.⁶ But since the terms "sale" and "selling" are statutorily defined to include contracts to sell or transfer,⁷ it could be argued that the cause accrues, and the limitation period begins to run, from the time the contract is signed especially since the exact instant when it accrues might be influenced by some particular regulation, order, or price schedule. It should also be remembered that while all actions should be instituted within one year from the occurrence of the violation, the buyer who fails to sue within thirty days after the violation may lose his right if the Administrator should proceed thereon.⁸

⁴ See 58 Stat. 640; 50 U. S. C. A. App. § 925(a). The Administrator may act to enjoin the eviction of a tenant: *Brown v. Wright*, 137 F. (2d) 484 (1943); *Henderson v. Fleckinger*, 136 F. (2d) 381 (1943). He may couple his request for injunction with a claim for damage even though the jurisdictional amount is not present: *Bowles v. Franceschini*, 145 F. (2d) 510 (1944).

⁵ A tenant facing eviction at the expiration of a lease may not seek a declaratory judgment as the jurisdictional amount would be lacking: *Hock v. 250 Northern Ave. Corporation*, 142 F. (2d) 435 (1944). The Administrator has taken the position that a suit for declaratory judgment, provided it seeks merely for a determination of the meaning of a regulation and is not brought for the purpose of anticipating an enforcement action, involves no conflict with 50 U. S. C. A. App. § 924 (d).

⁶ *El Paso Furniture Co. v. Gardner*, 182 S. W. (2d) (Tex. Civ. App.) 818 (1944). For that reason, a complaint alleging that defendant agreed to sell an automobile to plaintiff at a price in excess of the ceiling, but which did not allege that plaintiff had actually paid anything, was held insufficient to state a cause of action: *Lowres v. Fergus Motors Inc.*, 52 N. Y. S. (2d) 478 (1944).

⁷ 50 U. S. C. A. App. § 942(a).

⁸ *Ibid.*, § 925(e).

The usual rules of pleading and procedure apply to the treble damage action. As could be expected, courts have varied over the strictness and fullness of allegation required, shading from insistence upon the specific amount of overcharges, the price schedules relied upon, the dates of sale, and names of purchasers, to the other extreme of the barest ultimate facts.⁹ Permitting only the barest ultimate facts in the pleading rests upon the idea that most of the information is either within the seller's knowledge, may readily be obtained by discovery, or may be elicited at a pretrial conference, so that the defendant need be given only enough facts to frame a responsible pleading. Facts must be alleged, however, to support the allegation that the sales involved were not made to a person for use or consumption other than in the course of trade or business, for otherwise the complaint may be held to fail to state a cause of action even though that bare allegation, as a conclusion of law, be made.¹⁰ *A fortiori*, if such allegation is lacking the complaint states no cause of action,¹¹ as would also be the case if it contained no allegation as to the amount of the overcharge.¹² Causes of action for injunction and for damages may be joined in the same complaint and it is not misjoinder to so do.¹³ The pleader may, if he wishes, institute two separate actions for the prior injunctive decree will not constitute *res adjudicata* or estoppel in the subsequent treble damage action,¹⁴ although the defense of estoppel will probably not be

⁹ The cases vary from *Bowles v. Schultz*, 54 F. Supp. 708 (1944), and *Bowles v. Yankee Brewing Co.*, 4 F. R. D. 508 (1945), strict decisions; through *Bowles v. National Erie Corporation*, 3 F. R. D. 469 (1944), fairly strict; *Bowles v. Karp*, 3 F. R. D. 327 (1944), about midway; to *Bowles v. Liebman*, 1 C. C. H. Price Control ¶51,150, fairly liberal; *Bowles v. Cook Cheese Co.*, 1 C. C. H. Price Control ¶51,172, very liberal; and *Bowles v. Ex. 1 C. C. H. Price Control ¶52,038*, extremely liberal. No allegation that the suit is authorized by General Order No. 3 of the OPA is necessary if the complaint is signed by attorneys admitted to practice in the court in which the suit is filed: *Bowles v. American Brewery*, 146 F. (2d) 842 (1945). On the other hand, it was at first erroneously held that the Administrator must allege specific approval by the Secretary of Agriculture in actions based on overceiling sales of agricultural products: *Bowles v. Strickland*, 55 F. Supp. 132 (1944), reversed in 151 F. (2d) 419 (1945).

¹⁰ *Bowles v. Cabot*, 59 F. Supp. 855 (1945), reversed in 153 F. (2d) 258 (1946).
¹¹ *Dolan v. Smith*, 13 Conn. Supp. 459 (1945); *Lightbody v. Russell*, 293 N. Y. 492, 58 N. E. (2d) 508 (1944).

¹² In *Bowles v. Fode*, 2 C. C. H. Price Control ¶52,311 (D. C., No. Dak., 1945), such a complaint was dismissed without prejudice.

¹³ *Bowles v. National Erie Corporation*, 3 F. R. D. 469 (1944).

¹⁴ *Bowles v. Capitol Packing Co.*, 143 F. (2d) 87 (1944).

stricken on a simple motion.¹⁵ While a judgment for the plaintiff on the pleadings could be granted under the section prior to its amendment,¹⁶ that result appears unlikely in most cases under the present section¹⁷ for the reason that the court has been granted a wider discretion which may be exercised to better advantage when evidence is presented. The treble damage section may also prove a valuable defensive device. By way of counterclaim, in a seller's action for the price, the buyer may ask treble the amount by which the consideration exceeds the maximum price prescribed by the schedule,¹⁸ provided the transaction did not occur between merchants or tradesmen. The failure of the seller to comply with the applicable maximum price regulation may prove a successful defense, upon the ground of illegality, to his claim for recovery for goods sold and delivered.¹⁹

While the jurisdictional provision of the statute directs that the action may be brought in any court of competent jurisdiction, it does not in any way override the statutory provision that all such actions must be brought in the district or county in which the defendant (1) resides, or (2) has a place of business, (3) an office, or (4) an agent.²⁰ It is true that venue is a personal privilege which may be waived, as by a general appearance, by filing an affidavit or defense to the merits, or by failure to make seasonable objection,²¹ but if not waived, the action must be brought in one of the four specified places.²² The mandatory character

¹⁵ *Bowles v. Bissinger & Co.*, 3 F. R. D. 494 (1944).

¹⁶ *Bowles v. Vinson*, 1 C. C. H. Price Control ¶51,113 (D. C., N. M., 1943).

¹⁷ *Bowles v. Pelkin*, 3 C. C. H. Price Control ¶52,409 (S. D., N. Y., 1945). A general denial answer is not sufficient to prevent summary judgment where the exhibits and affidavits attached to the complaint go unchallenged and show no substantial question for determination: *Schreffler v. Bowles*, 153 F. (2d) 1 (1946). On request for admissions, pursuant to Rule 36 of the Federal Rules of Civil Procedure, defendant must specifically deny the matters on which admission is sought or will be held to have admitted the same so as to permit summary judgment: *Bowles v. Batson*, 61 F. Supp. 839 (1945).

¹⁸ *Hake v. Glenn*, 1 C. C. H. Price Control ¶50,934 (N. Y., 1943). *Morgan Sash & Door Co. v. Cullen Lumber Co.*, 195 Okla. 448, 159 P. (2d) 233 (1945), denied recovery to a merchant buying for resale.

¹⁹ *Heilbroner v. Wagner*, 185 Misc. 537, 56 N. Y. S. (2d) 434 (1945).

²⁰ 50 U. S. C. A. App. § 925(c).

²¹ *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U. S. 165, 60 S. Ct. 153, 84 L. Ed. 167 (1939); *Burnrite Coal Briquette Co. v. Riggs*, 274 U. S. 208, 47 S. Ct. 578, 71 L. Ed. 1002 (1927).

²² *Martocci v. Diorio*, 1 C. C. H. Price Control ¶52,081 (Pa. Com. Pleas, 1944).

of the provision is emphasized by the deletion of the words "wherever the defendant may be found" from the provisory clause in the amended statute,²³ which governs treble damage actions. It takes a rare case indeed to raise any question of venue in the light of these broad provisions as "office" and "place of business" are not synonymous. A selling agent who works for several concerns still conducts an "office" of the concern which compensates him even though it might not be regarded as that concern's "place of business." While a foreign corporation may not be "doing business" within a district so as to be "found" therein, it may nevertheless be deemed to be transacting business there so as to make the venue proper.²⁴ Moreover, only part of the act or transaction alleged to violate the section need take place within the district where suit is brought.²⁵

As always, the plaintiff has the burden of proving a violation by a fair preponderance of the credible evidence, whether the overcharge be for rent,²⁶ a service,²⁷ or in connection with the transfer of personal property.²⁸ The evidence must be such as to enable the court to resolve the truth of the matter, and the plaintiff must, of course, clearly bring himself within the terms of the section. Thus, if the suit is brought by a buyer, he must prove that the articles were purchased for use or consumption other than in the course of trade or business,²⁹ and when he challenges a sale as being above the ceiling price he has the burden of proving what the ceiling price is.³⁰ The burden may, however, shift to the defendant, particularly if he wishes to take advantage of the proviso clause in the amended statute to limit his liability,

²³ Compare 56 Stat. 33 with 58 Stat. 640.

²⁴ *Bowles v. Edward Mfg. Co.*, 57 F. Supp. 887 (1944).

²⁵ 50 U. S. C. A. App. § 925(c). But see *Bowles v. Bencher*, 53 F. Supp. 984 (1944).

²⁶ *Egling v. Lombardo*, 45 N. Y. S. (2d) 805 (1944). In *Kessler v. Grasser*, 300 Ky. 89, 187 S. W. (2d) 1012 (1945), however, the tenant was denied a recovery for alleged excessive rentals paid under a lease of property to be used as a "residence, storeroom and workshop" because the rent regulation applied only to residential property.

²⁷ *Alpert v. Greenlee*, — Ida. —, 148 P. (2d) 777 (1944).

²⁸ *Dunakin v. Southwestern Consumers Co-op Ass'n*, 49 N. M. 69, 157 P. (2d) 243 (1945); *Lightbody v. Russell*, 293 N. Y. 492, 58 N. E. (2d) 508 (1944).

²⁹ *Ibid.* See also *Marrow Mfg. Corp. v. Eitinger*, 58 N. Y. S. (2d) 11 (1945).

³⁰ *Bowles v. Gulf Refining Co.*, 61 F. Supp. 149 (1945).

for he will then have the burden of proving non-wilfulness and the exercise of practicable precautions.³¹

Since the treble damage action is based on a statute, the right to sue cannot be qualified by any provision in the lease or other contract purporting to waive the right or any of the incidental rights connected therewith, such as the right to trial by jury.³² And, because the statutory remedy is exclusive, a tenant may not minimize the statutory liability by suing for mere reimbursement, at least under the unamended section.³³ A conflict has arisen, however, under Section 205(a) of the statute, permitting the Administrator to sue for an "injunction, restraining order, or other order," as to whether or not the three last quoted words empower the court to order restitution or whether the treble damage action is the exclusive remedy for the recovery of money.³⁴ But the statutory remedies are not so exclusive as to bar a buyer from maintaining an ordinary action for fraud in a case where the elements of such an action exist,³⁵ so other civil remedies may be utilized.³⁶ It would also appear to be theoretically impossible to compromise the treble damage action, but in actual practice a large number of cases have been compromised, even with judicial approval.³⁷

One more preliminary point may be noted. The stay afforded

³¹ See cases cited in notes 80 and 81, post.

³² *Frieson v. Almin Realty Corporation*, 184 Misc. 346, 54 N. Y. S. (2d) 243 (1945).

³³ *Moore v. Coates*, 40 A. (2d) (Mun. Ct., D. C.) 68 (1944). Compare, since the amendment, "*Cimie*" v. Caldwell, 3 C. C. H. Price Control ¶52,444 (N. Y. Sup. Ct., 1945), with *Marrow Mfg. Corp. v. Eitinger*, 58 N. Y. S. (2d) 11 (1945).

³⁴ Compare *Bowles v. Warner Holding Co.*, 60 F. Supp. 513 (1944), affirmed in 151 F. (2d) 529 (1945), with *Office of Price Administration v. Georgian Hotel Co.*, 60 F. Supp. 155 (1945), and *Bowles v. Skaggs*, 151 F. (2d) 817 (1945), reversing 59 F. Supp. 4 (1945).

³⁵ *Southwest Lead & Zinc Co. v. Fox*, 1 C. C. H. Price Control ¶52,013 (Cal. Sup. 1944).

³⁶ The seller, on the other hand, may not avoid a contract entered into in excess of the ceiling price and will be denied the right to repossess the property: *El Paso Furniture Co. v. Gardner*, 182 S. W. (2d) (Tex. Civ. App.) 818 (1944). But compare with *Morgan Ice Co. v. Barfield*, 3 C. C. H. Price Control ¶52,514 (Tex. Civ. App., 1945), where the promisee of a contract to buy ice at over ceiling prices was not allowed to recover because the contract was illegal.

³⁷ See, for example, *In re Maier Brewing Co.*, 1 C. C. H. Price Control ¶51,132 (S. D., Cal., 1944). The court there indicated that neither the estate of the corporate debtor nor the trustee should be subjected to the financial risk of treble damages where there was controversy as to liability. See also the action taken in case cited in note 1, ante.

by the Soldiers' and Sailors' Civil Relief Act³⁸ is applicable even to this urgent price control action, but if there are two defendants and one of them is not protected by the provisions of that act, the action may proceed as against him without reference to the liability of the other.³⁹

II. CONSTITUTIONAL CONSIDERATIONS

The Act, in very sweeping language, precludes all courts except the Emergency Court of Appeals from passing upon the constitutionality of any regulation, order, or price schedule, and from staying or enjoining any provision of the Act authorizing the issuance thereof.⁴⁰ Now that the United States Supreme Court has held the general scheme of the statute to be constitutional,⁴¹ the problem of constitutionality has been greatly narrowed.

One point of contention is that the Administrator violates rights guaranteed by the Fourth and Fifth Amendments when procuring data to be the basis of the subsequent suit. As the statute requires persons engaged in business to keep records and to permit inspection thereof by the Administrator,⁴² the courts have held that these Amendments do not inhibit the Administrator's action,⁴³ on the theory that such records are regarded as quasi-public, hence automatically open to the Administrator.⁴⁴

³⁸ 50 U. S. C. A. App. §§ 521 and 524.

³⁹ *McFadden v. Shore*, 60 F. Supp. 8 (1945).

⁴⁰ 50 U. S. C. A. App. § 924(d).

⁴¹ *Yakus v. United States*, 321 U. S. 414, 64 S. Ct. 660, 88 L. Ed. 834 (1944); *Bowles v. Willingham*, 321 U. S. 503, 64 S. Ct. 641, 88 L. Ed. 892 (1944). On the subject of constitutionality in general, see Sprecher "Price Control in the Courts," 44 Col. L. Rev. 34 (1944), particularly pp. 37-42, and note in 12 Geo. Wash. L. Rev. 414.

⁴² 50 U. S. C. A. App. § 922(b).

⁴³ *Bowles v. Beatrice Creamery Co.*, 146 F. (2d) 774 (1944), reversing 56 F. Supp. 805 (1944); *Bowles v. Amato*, 60 F. Supp. 361 (1945); *Bowles v. Kirk*, 59 F. Supp. 97 (1945); *Bowles v. Stitzinger*, 59 F. Supp. 94 (1945); *Bowles v. Curtiss Candy Co.*, 55 F. Supp. 527 (1944); *Bowles v. Joseph Denunzio Fruit Co.*, 55 F. Supp. 9 (1944); *Bowles v. Chew*, 53 F. Supp. 787 (1944). If the papers, documents, etc., are sought by subpoena, the Administrator may have to show the relevancy thereof before defendant will be ordered to produce them: *Bowles v. Cherokee Textile Mills*, 61 F. Supp. 584 (1945).

⁴⁴ A discussion of this theory may be found in *Bowles v. Glick Bros. Lumber Co.*, 146 F. (2d) 566 (1945), particularly pp. 570-1. See also *Bowles v. Northwest Poultry & Dairy Products Co.*, 153 F. (2d) 32 (1946).

Attack has also been made on the ground that the penalties recoverable are so severe, oppressive, and unreasonable as to deprive the seller of his property without due process of law as well as constituting an unusual punishment in contravention of the Eighth Amendment. Illustrative of this argument is the Connecticut case of *Walsh v. Gurman*⁴⁵ where thirty-eight overcharges of \$1.00 each led to a judgment, under the unamended section, for \$1900. Certiorari was denied by the United States Supreme Court, however, possibly on the theory that the amended section empowers the court, in future cases, to mitigate hardships of that type.⁴⁶ It has been held that the recovery of a relatively large amount for a small overcharge is not a violation of the constitutional mandate that excessive fines may not be imposed,⁴⁷ nor does the recovery operate to deprive the defendant of property without due process as he is given reasonable opportunity to contest the validity of any regulation promulgated by the Administrator.⁴⁸ The fact that authority is in the Administrator to sue in some cases while the buyer sues in others, has been held not to constitute an unreasonable and therefore an unconstitutional classification,⁴⁹ nor as amounting to an unconstitutional attempt to enrich the United States Treasury⁵⁰ at the instance of one who has sustained no damage.⁵¹

Whether a defendant may claim a privilege against self-incrimination has received conflicting answers by the courts,⁵² but it would seem that the privilege should not apply⁵³ any more

⁴⁵ 132 Conn. 58, 42 A. (2d) 362 (1945), cert. den. sub nom. *Gurman v. Illg.* — U. S. —, 66 S. Ct. 24, 90 L. Ed. 35 (1945).

⁴⁶ 50 U. S. C. A. App. § 925(e) (1).

⁴⁷ *Lapinski v. Copacino*, 131 Conn. 119, 38 A. (2d) 592 (1944).

⁴⁸ *Bowles v. Indianapolis Glove Co.*, 150 F. (2d) 597 (1945), cert. den. — U. S. —, 66 S. Ct. 484, 90 L. Ed. (adv.) 338 (1946).

⁴⁹ *Ibid.* See also *Augustine v. Bowles*, 149 F. (2d) 93 (1945); *Bowles v. American Brewery*, 146 F. (2d) 842 (1945).

⁵⁰ *Speten v. Bowles*, 146 F. (2d) 602 (1945), cert. den. 324 U. S. 877, 65 S. Ct. 1023, 89 L. Ed. 1429 (1945).

⁵¹ *Bowles v. Indianapolis Glove Co.*, 150 F. (2d) 597 (1945), cert. den. — U. S. —, 66 S. Ct. 484, 90 L. Ed. (adv.) 338 (1946).

⁵² Compare *Bowles v. Berard*, 57 F. Supp. 94 (1944), with *Bowles v. Trowbridge*, 60 F. Supp. 48 (1945).

⁵³ This view finds some support in *Bowles v. Beatrice Creamery Co.*, 146 F. (2d) 774 (1944), reversing 56 F. Supp. 805 (1944).

than would the prohibition against double jeopardy.⁵⁴ The Seventh Amendment, requiring jury trial where the amount involved exceeds \$20, has been held insufficient to prevent a city court from exercising jurisdiction in such actions if no provision exists for a jury trial therein.⁵⁵ So it would seem well nigh certain that the treble damage action is constitutional, and counsel would do well to direct their efforts, outside of the Emergency Court of Appeals, to facts and legal arguments other than those bottomed on constitutional grounds.

III. WHO MAY INSTITUTE SUIT

As the statute was originally written, either the buyer who bought for use or consumption other than in the course of trade or business or the Administrator was authorized to sue. There was no overlapping, hence both could not sue.⁵⁶ By the subsequent amendment, the Administrator⁵⁷ is authorized to sue where the buyer could have sued but fails to do so within thirty days.

That amendment was probably enacted because Congress realized that there were too many isolated transactions where buyers declined to take advantage of their rights,⁵⁸ but it has been productive of confusion for it leaves an ambiguity as to what is necessary to constitute one a buyer "for use or consumption other than in the course of trade or business." Clearly, where a retailer sells to a purchaser for use or consumption, *i. e.* the typical over-the-counter purchase by the general public, the buyer may sue and, prior to the amendment, the Adminis-

⁵⁴ *Bowles v. Hoffman*, 61 F. Supp. 137 (1945).

⁵⁵ *Whatley v. Love*, (La. App.) 13 So. (2d) 719 (1943).

⁵⁶ *Bowles v. Rock*, 55 F. Supp. 865 (1944); *Bowles v. Curtiss Candy Co.*, 55 F. Supp. 527 (1944); *Alba Trading Co. v. Constants*, 181 Misc. 778, 47 N. Y. S. (2d) 138 (1944).

⁵⁷ The Administrator may sue in person or may designate an authorized representative to bring suit; *Bowles v. Wheeler*, 152 F. (2d) 34 (1945), cert. den. — U. S. —, 66 S. Ct. 265, 90 L. Ed. (adv.) 183 (1945). The suit need not be brought in the name of the United States: *Bowles v. West*, 63 F. Supp. 745 (1946).

⁵⁸ *Bowles v. Skaggs*, 59 F. Supp. 4 (1945), reversed in 151 F. (2d) 817 (1945).

trator might not.⁵⁹ But where a wholesaler sells to a retailer who purchases for resale rather than for use or consumption, such retailer lacks authority to institute suit as the right of action in such case is vested in the Administrator.⁶⁰

The rationale behind this distinction was obviously to enlist the ultimate consumer, who could not keep informed as to the ceiling prices of countless articles, in the battle against inflation. The Act made it worth his while to be an active agent in enforcing the law. On the other hand, merchants and dealers, trading with each other, were better able to keep informed and did not need to engage in inter-commercial litigation. In the latter situations, the Administrator was given the exclusive right to sue, especially as he had the licensing authority under the act and could, through the record-keeping requirements, readily assemble data for enforcement.⁶¹

One early interpretation of the law would have limited the Administrator's right to suits against black-market operators, bootleggers and others not regularly engaged in business.⁶² It was, fortunately, promptly repudiated,⁶³ and has virtually disappeared from the books largely because it takes considerable rewording of the statute to arrive at such a meaning.

More serious was the trouble that arose in cases where the article purchased fell in the category of capital goods, such as an agricultural combine or a mining machine. A serious and irreconcilable split of authority developed. One line of cases held that the phrase "other than in the course of trade or business" qualified the words "the person who buys such commodity," so that, if the purchase was made other than in the course of trade

⁵⁹ *Bowles v. Seminole Rock & Sand Co.*, 59 F. Supp. 751 (1944), affirmed in 145 F. (2d) 482 (1944), reversed on other grounds in 325 U. S. 410, 65 S. Ct. 1215, 89 L. Ed. 1700 (1945); *Provisional Government of French Republic v. Cabot*, 59 F. Supp. 855 (1945). A companion action to the latter case was reversed in 153 F. (2d) 258 (1946).

⁶⁰ *Bowles v. Francheschini*, 145 F. (2d) 510 (1944); *Bowles v. Sunshine Packing Corp.*, 59 F. Supp. 164 (1945); *Bowles v. Joseph Denunzio Fruit Co.*, 55 F. Supp. 9 (1944); *Bowles v. Chew*, 53 F. Supp. 787 (1944); *Morgan Sash & Door Co. v. Cullen Lumber Co.*, 195 Okla. 448, 159 P. (2d) 233 (1945).

⁶¹ *Bowles v. Chew*, 53 F. Supp. 787 (1944).

⁶² *Brown v. Glick Bros. Lumber Co.*, 52 F. Supp. 913 (1943).

⁶³ *Ibid.*, reversed in 146 F. (2d) 566 (1945), cert. den. 325 U. S. 877, 65 S. Ct. 1554, 89 L. Ed. 1994 (1945).

or business, the purchaser had the exclusive right of action.⁶⁴ The other line of cases adopted the view of the Administrator to the effect that the phrase "other than in the course of trade or business" qualified the prior phrase "for use or consumption," so that it was only in those cases where the use of the purchased article was not in the trade or business of the purchaser that the purchaser had the right of action.⁶⁵ Following this view, if a man bought a truck, not for resale but for use in his own business, he was not empowered to sue for treble damages.⁶⁶ While the interpretation gives meaning to all the words of the statute, especially the word "consumption" for the truck would be used up in the trade or business, and does not ignore a single word, yet it does result in limiting the class of those who can sue in their own right to purchasers of food, dress, household articles, and similar products. The opposite view, by contrast, is much broader for it regards only those buyers as disentitled to sue who are dealers in the commodity in question, *i. e.* those who buy for resale. Under this interpretation, a farmer who buys a tractor is not precluded from suing for treble damages, even though he uses it in the business of farming, for he does not buy it in the course of the trade or business of dealing and trading in tractors.

In attempting to decide which view is correct, legislative history and judicial precedent are important, but as support for both views may be found in the legislative history of the statute,⁶⁷

⁶⁴ *Bowles v. Madl*, 60 F. Supp. 152 (1945). A number of other district courts were in accord but their decisions were subsequently reversed: see cases cited in note 65, post. The Madl case was also subsequently reversed in 153 F. (2d) 21 (1945).

⁶⁵ *Bowles v. Whyne*, 152 F. (2d) 375 (1945), reversing 60 F. Supp. 78 (1945); *Bowles v. Rogers*, 149 F. (2d) 1010 (1945), reversing 57 F. Supp. 987 (1944); *Bowles v. Heinel Motors, Inc.*, 149 F. (2d) 815 (1945), affirming 59 F. Supp. 759 (1944); *Speten v. Bowles*, 146 F. (2d) 602 (1945); *Bowles v. Silverman*, 57 F. Supp. 990 (1944), appeal dismissed 145 F. (2d) 1022 (1944); *Bowles v. Seminole Rock & Sand Co.*, 145 F. (2d) 482 (1944), affirming 59 F. Supp. 751 (1944), but reversed on other grounds in 325 U. S. 410, 65 S. Ct. 1215, 89 L. Ed. 1700 (1945); *Bowles v. Rock*, 55 F. Supp. 865 (1944); *Lightbody v. Russell*, 293 N. Y. 492, 58 N. E. (2d) 508 (1944), reversing 267 App. Div. 603, 47 N. Y. S. (2d) 711 (1944).

⁶⁶ *Bowles v. Heinel Motors, Inc.*, 149 F. (2d) 815 (1945), affirming 59 F. Supp. 759 (1944).

⁶⁷ For the view that every purchaser, except the purchaser for resale, may sue: Sen. Rep. No. 931, 77th Cong., 2d Sess. Part IV thereof explains that: "If a buyer, whose seller has violated a maximum price regulation or price schedule, is not entitled to bring such action, because he is a buyer in the course of trade or

the former is not decisive. The Administrator, charged with the duty of administering the act, has officially interpreted the phrase "in the course of trade or business" as applying to purchases by industrial and commercial consumers as well as to purchases for resale,⁶⁸ and his interpretation is entitled to great weight.⁶⁹ The preponderance of judicial authority now decidedly supports that interpretation.⁷⁰ But the strongest argument of all lies in the fact that the words "in the course of trade or business" follow, and therefore qualify, the words "use or consumption," rather than the word "buys." Congress, not the courts, should re-write the statute if it is to be re-written.

From a practical viewpoint, the 1944 amendment has partially solved this controversy in recognizing the Administrator's right to sue if the buyer could have but does not sue within thirty days⁷¹ as well as in cases where, for any reason, the buyer may not.⁷² However, the question may still be important in some instances, particularly to a buyer who is forced to decide whether the act authorizes him to institute suit.

It should also be remembered that the act prevents double prosecution for it bars the buyer from taking action if the Administrator has instituted suit on the same violation.⁷³ Moreover, the amended act provides that a judgment for damages

business, or for other reasons, the Administrator may bring such action on behalf of the United States." The view that a purchaser may not sue, even if he is the ultimate consumer, if he buys for use or consumption in his business, is borne out by Hearings before Senate Banking Committee on Price Control Bill, H. R. 5990, 77th Cong., 1st Sess., p. 141, as well as by the testimony of David Ginsburg at p. 216. The only purchasers empowered to sue in their own right were "non-commercial consumers," according to Conference Report on the Price Control Bill, H. R. 1658, 77th Cong., 2d Sess., p. 26, or "the housewife, in effect," according to Hearings before Senate Banking Committee on Price Control Bill, op. cit., p. 141. See also S. R. No. 931, 77th Cong., 2d Sess., p. 8, and 88 Cong. Rec. 664.

⁶⁸ C. C. H. War Law Service, Price Control, ¶42,402.16.

⁶⁹ *United States v. American Trucking Associations*, 310 U. S. 534 at 549, 60 S. Ct. 1059, 84 L. Ed. 1345 at 1354 (1940).

⁷⁰ See cases cited in note 65, ante.

⁷¹ 50 U. S. C. A. App. § 925(e).

⁷² *Ibid.* It was held, in *Bowles v. Liberto*, 2 C. C. H. Price Control ¶52,210 (City Ct., Baltimore, Md., 1945), that where OPA agents, using funds of the United States, made small purchases at prices in excess of ceiling, the Administrator was entitled to sue because the buyers were "not entitled . . . to bring the action."

⁷³ 50 U. S. C. A. App. § 925(e).

under Section 205(e) bars recovery of damages in any other action against the same seller on account of sales made to the same buyer prior to the institution of the action in which such judgment is rendered.⁷⁴ As a consequence, the individual buyer, contemplating suit, should investigate to see if any action is already pending on the same violation and, if not, should make his suit sufficiently inclusive to cover all demands to date.

IV. WHO IS LIABLE TO SUIT

The statute declares that any person selling a commodity in excess of ceiling price is liable, while at the same time providing that the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity. The broad statutory definitions given to such words as "person," "selling," "sale," "commodity," and the like,⁷⁵ make the statute so comprehensive as to include virtually every transaction. Any question as to who is liable for a violation thereof, as a consequence, is narrowed to the point where the words "any person" become crucial in fixing that liability.

A literal interpretation of these words would lead to the conclusion that every person who sells in violation of an OPA regulation is liable, regardless of his position as automaton, servant, agent, and the like, or his lack of control or responsibility for his action. While it is conceivable that this is what the statute means, it hardly seems that it must necessarily be so construed. In fact, one court has brushed off such an argument with the flat statement that the agent who handles the collection of the excessive rent is not liable.⁷⁶ But the orthodox and usual situation is presented in *Dorsey v. Martin*,⁷⁷ where the court squarely held

⁷⁴ Ibid. The buyer should also observe the one-year period of limitation: *Bowles v. Babar*, 54 F. Supp. 453 (1944); *Schwartz v. Dell'osso*, 23 N. J. Misc. 151, 42 A. (2d) 306 (1945).

⁷⁵ 50 U. S. C. A. App. § 942.

⁷⁶ *McCowen v. Dumont*, 54 F. Supp. 749 (1944). That holding, perhaps, should be confined to the unusual facts found therein. The landlord-principal was an invalid, probably a mental incompetent, and her son, who acted as her agent in collecting the rent, was a plumber by trade. The situation is not comparable to the ordinary managing rental agent.

⁷⁷ 58 F. Supp. 722 (1945).

that liability could not be escaped on the ground that the person collecting the rent was only an agent. The court found support for that view not only in the statute but also in the Administrator's rent regulation which defined "landlord" as including an agent. This additional reliance should not be regarded as too significant in view of the strong language used, for the court stated:

Unquestionably it was intended that the agent who violated the Act should be liable. As a practical matter, the agent may be even more guilty than the owner. The business of renting is often placed in the hands of the agent, and the owner may not even know of the violation. The agent can hardly plead ignorance because he is in a position to learn the truth merely by getting in touch with the local Office of Price Administration.⁷⁸

Subsequent holdings confirm this conclusion,⁷⁹ although there is some conflict of authority on the subject.⁸⁰

Although the two views are not harmonious in principle, they are understandable in terms of their particular facts and circumstances. It would appear likely, therefore, that the factual background will influence the result. For example, a clerk who marks a package in excess of the ceiling price at the behest and under the specific direction of the store owner or manager is hardly likely to be held liable inasmuch as a court would probably hold the owner or manager, who ordered the act done, responsible for the violation. While the clerk could technically be regarded as liable, ethical and practical reasons would direct that he be absolved. On the other hand, if the branch manager of a used car lot, despite directions of the corporate employer, located in a distant city, to comply strictly with ceiling prices, should violate such orders and, in careless disregard of established prices, sell

⁷⁸ 58 F. Supp. 722 at 723.

⁷⁹ *Kurland v. Bukspan*, 184 Misc. 590, 55 N. Y. S. (2d) 135 (1945); *Cha-Kir Realty Corporation v. Sanchez*, 183 Misc. 427, 52 N. Y. S. (2d) 482 (1944), both hold the principal and agent liable.

⁸⁰ In *Husers v. Papania*, (La. App.) 22 So. (2d) 755 (1945), the agent was held not liable on the ground that "representative" was taken to mean a legal successor, such as guardian, executor or the like, rather than one appointed by private contract.

a car in excess of the ceiling price, it would seem that the manager might well be held to personal liability. Although the owner or corporate employer might not escape liability,⁸¹ such factual background might well induce a court to construe the words "any person" in a manner appropriate to the situation. It would seem important, therefore, that the particular facts should be alleged upon which to found liability.

In that respect, it has been held that an attorney-in-fact who was charged with managing the business at all times during the alleged violations might be made a defendant,⁸² as could also a partner, whether doing business in person or by agent.⁸³ On the point as to whether corporate officers and directors, as well as the corporation, might be made defendants, the rule prior to amendment of the statute was that they could be so named provided the complaint alleged that they acted as representatives of the corporation in the sale and delivery of the goods in question.⁸⁴ A recent decision construing the amended statute, however, holds that such officers and directors should not be joined as defendants for the reason that only the "seller" is liable, thereby differentiating between the corporate seller and the salesman.⁸⁵ While the court conceded that a strong argument could be made in favor of holding the officers of the corporation personally liable, particularly where the corporation had become financially unable to respond in damages, and likewise admitted that a closely-held corporation might be used as a shield to protect the real owners from personal liability, it expressed the opinion that the matter was one for Congressional consideration. In any event, a mere general allegation that a person has participated actively in the

⁸¹ It was held to be no defense, in *Regan v. Kroger Grocery & Baking Co.*, 386 Ill. 284, 54 N. E. (2d) 210 (1944), that the sales were made by the agents of the corporate defendant without its prior knowledge or subsequent approval.

⁸² *Bowles v. Lecht*, 1 C. C. H. Price Control ¶51,988 (D. C., R. I., 1944).

⁸³ *Jung v. Bowles*, 152 F. (2d) 726 (1946).

⁸⁴ *Brown v. Cummins Distilleries Corporation*, 53 F. Supp. 659 (1944). Whether they actually so participated is, of course, a question of fact to be resolved at the trial: *Bowles v. Yankee Brewing Co.*, 62 F. Supp. 588 (1945).

⁸⁵ *Bowles v. Cardinal Cutlery Corp.*, 3 C. C. H. Price Control ¶52,507 (S. D., N. Y., 1946).

business of a corporate defendant is not enough to warrant holding him to liability under the statute.⁸⁶

Responsibility of the principal, of course, would rest on generally accepted doctrines of agency law.⁸⁷ There is one case,⁸⁸ however, which excused the principal from liability on the questionable rationale that the doctrine of *respondeat superior* did not apply because the action was penal in character.⁸⁹ The facts of that case indicate that the defendant became owner of the premises just prior to an overcharge of rent, but it did not appear that he had directed any increase, had engaged the person making the excessive charge, or had ever received the same. The holding might be explained in the light of these circumstances. It does, at least, serve to illustrate that the background might well make a difference on the question of liability to suit.

V. NATURE OF THE ACTION

Lawyers and judges tend to think of legal theories in terms of crystallized categories, and the terms "penal" and "remedial," when applied to statutes, have come to have some "meaning" if that word imports familiarity although their exact significance may not be apparent in a particular situation. While there is nothing positively wrong in building a rationale on such concepts, it would seem that, as applied to Section 205(e) and the action thereunder, it has been overdone.

The whole discussion of whether the action is penal or remedial appears to have been started as a means of attempting to block suits brought in state courts. In *Childs v. Cruise*,⁹⁰ for example,

⁸⁶ *Bowles v. Brookside Distilling Products Corp.*, 60 F. Supp. 16 (1945). But see *Bowles v. Yankee Brewing Co.*, 62 F. Supp. 588 (1945).

⁸⁷ *Regan v. Kroger Grocery & Baking Co.*, 386 Ill. 284, 54 N. E. (2d) 210 (1944).

⁸⁸ *Zuest v. Ingra*, 132 N. J. L. 37, 38 A. (2d) 457 (1944), affirmed in — N. J. L. —, 45 A. (2d) 810 (1946).

⁸⁹ Such rationale appears objectionable not only because it does not give full force to the Act, but also because it flies in the face of a prior determination of the same court to the effect that the action was remedial and not penal: *Beasley v. Gottlieb*, 131 N. J. L. 117, 35 A. (2d) 49 (1943). That case and similar holdings were repudiated in *Zuest v. Ingra*, — N. J. L. —, 45 A. (2d) 810 (1946), when the New Jersey Court of Errors and Appeals concluded that the Act was penal in character.

⁹⁰ 1 C. C. H. Price Control ¶50,939 (Cal. Sup., 1943).

plaintiff sued to recover \$50 for an alleged overcharge of thirteen cents, and the California court held that the motion to dismiss should be sustained because "it has been the rule that the courts of one sovereignty would not enforce the penal laws of another sovereignty or entertain actions for penalties based on or arising out of their laws." Another court in the same state indicated that Congress could "not compel the state courts to act as penal enforcement agents of the United States," but when mandamus proceedings were instituted to force it to hear and determine the cause, the writ was issued on the ground that a state court must assume jurisdiction of an action created by federal law, regardless of whether or not that action be considered either as penal or as "furthering the governmental interest."⁹¹

Other courts, as a means toward finding that they possessed jurisdiction, have labelled the action "remedial," although a variety of reasons have been given to justify that classification.⁹² It has been said that the denomination of the recovery as "damages" proves that the action was intended to be remedial and not penal.⁹³ The fact that the action is brought by the party aggrieved and inures to his benefit has been regarded as significant.⁹⁴ Numerous judicial precedents based on other statutes providing for double damages or a flat-sum recovery have been relied on.⁹⁵ It has been noted that the subsection is entitled "Actions to Recover Damages" and bears a striking analogy to provisions of the Fair Labor Standards Act, serving the same purpose in the fight against inflation as the double-damage provision thereof serves in the fight for fair wages.⁹⁶ Remark has been made over the fact that the offense is not of such nature

⁹¹ *Miller v. Municipal Court of City of Los Angeles*, 22 Cal. (2d) 818, 142 P. (2d) 297 (1943). The majority were unwilling to label the action as remedial in character, but the dissenting judge vigorously insisted on expressing his views on the matter: 22 Cal. (2d) 818 at 861, 142 P. (2d) 297 at 321-2.

⁹² See *Schaubach v. Anderson*, 3 C. C. H. Price Control ¶52,485 (Va. App., 1946), and cases cited in notes 93 to 99, post.

⁹³ *Kaplan v. Arkellian*, 21 N. J. Misc. 209, 32 A. (2d) 725 (1943).

⁹⁴ *Beasley v. Gottlieb*, 131 N. J. L. 117, 35 A. (2d) 49 (1943).

⁹⁵ *Pratt v. Hollenbeck*, 1 C. C. H. Price Control ¶51,735 (Pa. Com. Pleas, 1943), contains the best collection of these authorities.

⁹⁶ 29 U. S. C. A. § 216(b). The liquidated damages recoverable thereunder have been held not to be a penalty: *Overnight Motor Transp. Co. v. Missel*, 316 U. S. 572, 62 S. Ct. 1216, 86 L. Ed. 1682 (1942).

that the executive could pardon,⁹⁷ for the action is not one customarily brought in courts of misdemeanor for the collection of penalties growing out of the violation of petty governmental regulations.⁹⁸ Even though small sums may be involved, treble damages are regarded as remedial in fact as well as in law because the imposition thereof is "merely one way of attempting to render full restitution to the injured party for the time, trouble and delays usually attendant in enforcing his rights."⁹⁹ Whatever the reason, treating the action as remedial leads to the desired result, *i.e.* that the action may be maintained in the state courts.¹

It seems doubtful that the lengthy discussion of whether the statute is penal or remedial has added much to the law, for a number of courts have held that, regardless of the penal or remedial character of the provision, they had jurisdiction over treble damage actions.² There is a simple rationale for this result. Section 205(e) specifically provides that the action may be brought in "any court of competent jurisdiction," and the meaning of this phrase has been definitely fixed, by decisions under the Fair Labor Standards Act involving identical phraseology,³ to include state as well as federal courts.⁴ If anything more is needed, the intent of Congress is apparent from Section 205(c) of the Price Control Act which says that the district courts shall have jurisdiction of criminal proceedings and, concurrently with state courts, of "all other proceedings" under Section 205.⁵ Since the existence of jurisdiction raises an impli-

⁹⁷ *Kaplan v. Arkellian*, 21 N. J. Misc. 209, 32 A. (2d) 725 (1943).

⁹⁸ *Rutkiewicz v. Great Atlantic & Pacific Tea Co.*, 1 C. C. H. Price Control ¶50,963 (Circuit Ct., Wis., 1943).

⁹⁹ *Pratt v. Hollenbeck*, 1 C. C. H. Price Control ¶51,735 (Pa. Com. Pleas, 1943).

¹ There may still be jurisdictional limitations, however, which must be observed: *Zuest v. Ingra*, — N. J. L. —, 45 A. (2d) 810 (1946).

² *Lapinski v. Copacino*, 131 Conn. 119, 38 A. (2d) 592 (1944); *Lambros v. Brown*, — Md. —, 41 A. (2d) 78 (1945); *Egling v. Lombardo*, 181 Misc. 108, 43 N. Y. S. (2d) 358 (1943). In *Bowles v. Barde Steel Co.*, — Ore. —, 164 P. (2d) 692 (1945), the Supreme Court of Oregon viewed the action as being one for a penalty, but squarely ruled that, even so, the state courts possessed jurisdiction. See also notes in 11 Geo. Wash. L. Rev. 348 and 12 Geo. Wash. L. Rev. 472.

³ 29 U. S. C. A. § 216(b).

⁴ See, for example, *Cunningham v. Davis*, 203 Ark. 982, 159 S. W. (2d) 751 (1942); *Mengel Co. v. Ishee*, 192 Miss. 366, 4 So. (2d) 878 (1941).

⁵ U. S. C. A. App. § 925(c).

cation of a duty to exercise it,⁶ and since the federal statutes are as much the law of a given state as the enactments of its own legislature,⁷ it is not necessary to determine whether the treble damage action is penal or remedial for purposes of deciding whether the state court has jurisdiction.

The issue as to whether the statute is penal rather than remedial has become more pointed over the question as to whether the cause of action survives the seller's death. Probably the best argument for the penal character of the statute has been made in this regard. The argument that it is penal stems basically from the view that the wrong sought to be redressed is a wrong to the public, not to a particular individual, and that the controlling purpose of Section 205(e) is to curb inflationary tendencies by punishing violators, thereby deterring potential violators, through forcing them to pay penalties to the Administrator or to the ultimate consumer. The recovery, under this argument, is a penalty for it sometimes goes to a third person instead of the one directly injured and the sum exacted may be grossly disproportionate to the actual injury sustained. It was the considered view of the Circuit Court of Appeals for the Sixth Circuit, in *Bowles v. Farmers National Bank of Lebanon, Kentucky*,⁸ that the statute provided for a penalty, hence the action did not survive the death of the one charged with the violation.⁹ When so holding, the court indicated that the fact that the sum was to be recovered through a civil suit, as opposed to a criminal action, did not determine the nature of the exaction.¹⁰ It also drew a

⁶ *McKnett v. St. Louis & S. F. Railway Co.*, 292 U. S. 230, 54 S. Ct. 690, 78 L. Ed. 1227 (1934); *Second Employers' Liability Cases*, 223 U. S. 1, 32 S. Ct. 169, 56 L. Ed. 327 (1912).

⁷ U. S. Const., Art. VI. Judicial decisions so holding as to the section in question may be found in *Miller v. Municipal Court of City of Los Angeles*, 22 Cal. (2d) 818, 142 P. (2d) 297 (1943); *Lapinski v. Copacino*, 131 Conn. 119, 38 A. (2d) 592 (1944); *Regan v. Kroger Grocery & Baking Co.*, 386 Ill. 284, 54 N. E. (2d) 210 (1944); *Bowles v. Heckman*, — Ind. —, 64 N. E. (2d) 660 (1946); *Schaeffer v. Leimberg*, — Mass. —, 63 N. E. (2d) 193 (1945); *Beasley v. Gottlieb*, 131 N. J. L. 117, 35 A. (2d) 49 (1943). *Contra*: *Robinson v. Norato*, — R. I. —, 43 A. (2d) 467 (1945).

⁸ 147 F. (2d) 425 (1945).

⁹ The court held that, as the penalties had a federal source, the state statute providing for survival of actions had no application: 147 F. (2d) 425 at 430.

¹⁰ The court cited *Hepner v. United States*, 213 U. S. 103, 29 S. Ct. 474, 53 L. Ed. 720, 27 L. R. A. (N. S.) 739 (1909); *United States v. Zucker*, 161 U. S. 475, 16 S. Ct. 641, 40 L. Ed. 777 (1896); *Lees v. United States*, 150 U. S. 476, 14 S. Ct. 163, 37 L. Ed. 1150 (1893).

distinction between the case before it and *Helvering v. Mitchell*¹¹ on the ground that, in the latter case, the government itself was defrauded. As Congress had not expressly provided that the treble damages or \$50 recovered should be regarded as liquidated damages, the court concluded that the intrinsic nature of the provision should control. Read in the light of the declared purpose of the statute, *i.e.* to protect the public during the war emergency,¹² it decided the claim for damages represented a penalty rather than compensation. The result is questionable, but it has been followed by the Iowa Supreme Court in a five-to-four decision.¹³

On the other hand, with virtually no discussion, a United States District Court sitting in Pennsylvania had earlier held exactly the opposite, namely, that the cause of action was remedial, would survive the violator's death, and would leave his estate liable for the amount recoverable.¹⁴ On the surface, it would seem that these two courts used the nature of the action as the means for dictating the conclusion and thereby arrived at opposite results. Upon analysis, however, it is evident that the law which was found to be controlling dictated the actual outcome. The court in the last mentioned case regarded Pennsylvania law as controlling,¹⁵ whereas the court in the other case conceived itself bound by federal law. The real problem on this issue, therefore, is one of conflict of laws, *i.e.* does state or federal law control. While, in all probability, the state law should control, the weight of existing authority at the present moment is that federal law controls and, in the absence of statute providing otherwise, common-law doctrines prevail so that the cause of action does not survive the death of the violator.

Again, whether the treble damage action is remedial or penal has been made the criterion for deciding whether a defendant might claim a privilege against self-incrimination.¹⁶ The results

¹¹ 303 U. S. 391, 58 S. Ct. 630, 82 L. Ed. 917 (1938).

¹² See 50 U. S. C. A. App. § 901.

¹³ *Stevenson v. Stouffer*, — Iowa —, 21 N. W. (2d) 287 (1946).

¹⁴ *Everly v. Zepp*, 57 F. Supp. 303 (1944).

¹⁵ See Purdon's Pa. Stat. Ann., Title 20, § 772.

¹⁶ U. S. Const., Amend. V.

here are likewise in direct conflict, for, when held to be remedial the defendant has been denied any such privilege,¹⁷ whereas when held to be penal the claim of privilege has been sustained.¹⁸ The first of these views seems to be the sounder, not because the action is labelled "remedial," but because of basic distinctions between civil suits as opposed to criminal prosecutions. The court which granted the privilege seemed to be afraid that the information elicited in the treble damage action would be subsequently used in criminal proceedings. There is always this danger where the same act gives rise to both civil and criminal liability, yet the plaintiff is generally allowed to obtain information for his civil action without reference to the Fifth Amendment, particularly where, as here, there are impelling policy considerations. Although the court which denied the claim of privilege used the word "remedial," the same result would be reached if that word were excised. The stress of Section 205(e) is obviously on civil liability for money damages, as the treble damage section is separated from that part of the statute which provides for criminal prosecution. Rationalizing the solution by relying on the basis of "penal" versus "remedial" doctrines is wholly unnecessary. The same basic principle underlies the holding that admissions by an overcharging seller may be received in evidence against him without prior proof of a *corpus delicti*.¹⁹

In much the same way, the "penal" versus "remedial" test affords no measure to determine the sum which a given defendant must pay. One would think that if the statute were penal in character, the liability would be greater than if it were merely remedial. But examination of the decisions reveals that there is no relation at all between the amount of the judgment and the characterization of the action.²⁰ If anything, where regarded as

¹⁷ Bowles v. Seitz, 62 F. Supp. 773 (1945); Bowles v. Berard, 57 F. Supp. 94

¹⁸ Bowles v. Trowbridge, 60 F. Supp. 48 (1945).

¹⁹ Bowles v. Hernandez, 3 C. C. H. Price Control ¶52,416 (Mun. Ct., Cal., 1945). (1944).

²⁰ For example, in Ward v. Bochino, 181 Misc. 355, 46 N. Y. S. (2d) 54 (1944), the action was treated as penal but thirty-one overcharges of fifty cents each produced a recovery of only \$50. In Thompson v. Taylor, 60 F. Supp. 395 (1945), another "penal" case, a \$7.45 overcharge for each of seven months led to the recovery of \$350. In contrast, compare Everly v. Zepp, 57 F. Supp. 303 (1944), a "remedial" action based on a \$7.00 overcharge for each of ten months which

penal, the courts have tended to argue that cumulative penalties are unwarranted so that a smaller judgment is likely to result.

It is a familiar doctrine that a penal statute should be strictly construed while a remedial one should receive liberal construction. That doctrine has provided added incentive to use these words for the sake of effect. There is frequent reference to the "penal" or "remedial" character of the treble damage action in opinions dealing with all kinds of problems thereunder, but it is doubtful whether such arguments carry much weight. More often than not they are just additional stones in the structure rather than keystones which actually support the weight of the decision,²¹ for the opinions often go on to add that the act in question should be given a reasonable construction in the light of the purposes it was designed to accomplish.²²

While the "penal" versus "remedial" analysis is one method of reaching and justifying a result, it does not seem essential or wise to insist upon such dichotomy. Not only do the arguments based upon the purposes of the statute overlap instead of being antithetical, but the words "penal" and "remedial" fade still farther into insignificance when one finds declarations that a statute may be punitive without being penal,²³ and that, though the recovery is greater than the actual amount of damage, the action is still remedial.²⁴ Semantically, then, there is no necessity for a complete dichotomy and, teleologically, the necessity is far from clear. The fact is that the statute has both penal and remedial characteristics.²⁵

produced a recovery of only \$50, with *Pratt v. Hollenbeck*, 1 C. C. H. Price Control ¶51,735 (Pa. Com. Pleas, 1943), also "remedial" in character, where seventeen rental payments, each creating a cause of action for \$50, resulted in a total judgment for \$850.

²¹ See *Speten v. Bowles*, 146 F. (2d) 602 (1945); *Bowles v. Chew*, 53 F. Supp. 787 (1944); *Dunakin v. Southwestern Consumers Co-op Ass'n*, 49 N. M. 69, 157 P. (2d) 243 (1945).

²² See, for example, *Bowles v. Silverman*, 57 F. Supp. 990 (1944).

²³ *Beasley v. Gottlieb*, 131 N. J. L. 117, 35 A. (2d) 49 (1943).

²⁴ *Schaeffer v. Leimberg*, — Mass. —, 63 N. E. (2d) 193 (1945).

²⁵ It seems absurd to say that a tenant who pays a \$1.00 overcharge each week for thirty-eight weeks and who recovers \$1.900 is merely recovering damages: *Walsh v. Gurman*, 132 Conn. 58, 42 A. (2d) 362 (1945), cert. den. sub nom. *Gurman v. Illg.* — U. S. —, 66 S. Ct. 24, 90 L. Ed. (adv.) 35 (1945). His action is designed to, and does, penalize the landlord severely. On the other hand, particularly under the amended section, if the buyer merely recovers the amount of the overcharge, it is equally absurd to call the action "penal."

Nor does it seem necessary to classify the Administrator's action as wholly and exclusively penal, even conceding that very respectable authority can be cited for the view that where the government sues, and the money goes into the public treasury, the action is merely a different form of punishment for an offense against the state.²⁶ If a given buyer's action would be remedial in character even though seeking exemplary damages, then suit by the Administrator if the buyer does not act is obviously on the same plane. There is no difference in the purpose or nature of the two actions; the recovery is identical in each; both must be brought within a year, in contrast to the general period of limitation provided for penal actions; and judgment in either action bars suit by the other. Further indication that they are the same is to be found in the fact that the same standards apply to both. The case of either need be proved by a mere preponderance of the evidence; a verdict may be directed against the defendant; a judgment on the pleadings may be rendered for the plaintiff; and the losing party may appeal. Classifying the one action as remedial and that of the other as penal seems unwise and unsound. The same law should be applied to both actions, for they are both penal as to the offender but remedial as to the one injured.²⁷ All things considered, it seems best to scrap the "penal" versus "remedial" test for deciding cases.²⁸

Perhaps the best way to describe the action permitted by Section 205(e) is to say that is a limited *qui tam* action. It is not quite a typical *qui tam* action for it may be brought only by a person who has himself been damaged rather than by an utter stranger. It is closely analogous, however, for the penalty is

²⁶ *Wisconsin v. Pelican Ins. Co. of New Orleans*, 127 U. S. 265, 32 L. Ed. 239 (1888).

²⁷ See note in 11 Geo. Wash. L. Rev. 348, particularly pp. 351-2.

²⁸ This conclusion is fortified by a comparison of numerous doctrinal rationalizations based on *Huntington v. Attrill*, 146 U. S. 657, 13 S. Ct. 224, 36 L. Ed. 1123 (1892), which is cited as precedent for construing the statute as remedial in *Dorsey v. Martin*, 58 F. Supp. 722 (1945), but urged to prove that it is penal in character in *Bowles v. Farmers Nat. Bank of Lebanon, Ky.*, 147 F. (2d) 425 (1945). The *Attrill* case recognized the elastic character of the "penal" concept. Transposing the concept into the varied situations arising under the Price Control Act, and giving extraordinary force to dictum in the *Attrill* case, appears to be obfuscatory rather than clarifying. Wordy opinions may be both shortened and improved by omitting it.

designed to induce the person who has been overcharged to enforce the law. Because of the discretion given to the trial courts since the amendment of the statute, there is less chance that the treble damage provision will provide a windfall for persons possessed of malevolent or disagreeable motives. In addition, the elimination of the cumulative recovery feature removes the objectionable characteristics of true *qui tam* actions. Unless the action is to be classed as *sui generis*, a singular remedy created for an extraordinary situation, it may well be called a limited *qui tam* action, but with emphasis on the word "limited." As such, it should be treated as being neither exclusively penal nor exclusively remedial and, as a consequence, a reasonable interpretation, as distinguished from either a strict or a liberal one, should be given to the statute.

VI. EXTENT OF THE SELLER'S LIABILITY

A. PRIOR TO AMENDMENT

Before the statute was amended, considerable conflict and disagreement arose as to the extent of liability thereunder both in respect to over-ceiling sales of personal property and overcharge in rent cases. Nowhere do the innumerable problems of price control come out stronger than in the attempt to clamp a ceiling on countless items of personal property. Attempts to tamper with what had previously been the unchallenged right of a seller to dispose of his goods at whatever price he chose fairly bristle with questions.

So far as sales of personal property were concerned, Section 205(e) at first declared that the overcharged buyer was privileged "to bring an action" for \$50 or treble the amount of the overcharge.²⁹ From the outset, the Administrator contended that the quoted words should be read as if they had been written "the seller shall be liable." Clear and logical analysis, however, demonstrates that the words simply meant "commence a suit." There is no doubt that such is the ordinary, familiar and rea-

²⁹ See 56 Stat. 34.

sonable meaning thereof, so that if Congress had intended to mean "shall be liable" it should have said so. To hold otherwise would completely divest the courts of discretion and force them to grind out automatic judgments in every case. Moreover, if every shopkeeper had to forfeit \$50 to each customer whom he inadvertently and unintentionally overcharged a few cents, he could unwittingly put himself out of business in a few minutes by making a series of small overcharges. Without doubt, then, the statute merely authorized the overcharged buyer to institute legal proceedings and prescribed the maximum for which he could sue.

Such was the reasoning in *Hall v. Chaltis*,³⁰ where plaintiff paid \$2.50 for a pair of hose on which the ceiling price had been lowered from \$2.50 to \$1.65 on the very day of the purchase. Defendant had no notice nor reasonable opportunity of learning of the change until three days after the sale, so plaintiff's recovery was limited to the exact amount of the overcharge. The court expressed itself as being appalled at the idea that, if the Administrator's interpretation was adopted, the doors of justice would be firmly closed against any attempt to show that a given defendant had had difficulty in interpreting and applying the regulations;³¹ had been entrapped by one having advance notice of a price reduction; or had innocently made the overcharge without notice of a lowered ceiling.³²

The reasoning of the Chaltis case was followed by the lower court in *Brown v. American Stores, Inc.*,³³ where plaintiff paid fourteen cents for a can of soup on which the ceiling price was ten cents. It did not appear whether plaintiff, having personally

³⁰ 31 A. (2d) 699 (Mun. Ct. of App., D. C., 1943).

³¹ The schedule there concerned included twenty-seven retail prices for various types of stockings. Many schedules are even more intricate.

³² In a concurring opinion, Associate Judge Hood expressed the view that no one should be held for violation of a revised price schedule unless he had a reasonable opportunity to acquire notice of the change. Any other construction, he indicated, would mean that Congress intended to treat alike those who had no notice or opportunity to acquire notice, those who had the opportunity but neglected to acquire notice, and those who, with actual notice, deliberately refused to comply. As this would be an affront to justice, any argument that the damage is done by the fact of overcharge, regardless of how it occurred, may serve as an explanation for such view but is not a satisfactory justification for it.

³³ 32 A. (2d) 388 (Mun. Ct. of App., D. C., 1943).

selected the can from a shelf properly marked, realized at the time that an overcharge was being made by the cashier or did anything to call attention to the error. The can itself had been inadvertently marked at the higher price by a clerk, but price ceilings were properly posted, shelves had been properly marked, and there was no evidence of an intent to violate the price regulations. Plaintiff was permitted a recovery of \$5.00 instead of the \$50.00 claimed. On appeal, the Circuit Court of Appeals for the District of Columbia reversed, holding that the statutory words "bring an action for \$50" meant "shall have a right to recover \$50."³⁴ That court felt that Congress did not intend to encourage purchasers to bring actions by holding out to them the hope of reward of not less than \$50 and at the same time intend that such sum could be reduced at the discretion of a court according to its individual judgment as to the proper amount to be awarded. If good faith, inadvertence, or mitigating circumstances of any kind were to be taken into consideration, such intention should have been expressed in appropriate language.³⁵

After certiorari was denied, the American Stores case became the leading authority in support of the proposition that a minimum judgment of \$50 was required whenever a violation was proven. But the case has been challenged as conflicting in principle with, though readily distinguishable from, the holding in the case of *Hecht Company v. Bowles*.³⁶ It has also been sharply criticized on the ground that a plaintiff should consider himself fully compensated by an award sufficient, in the discretion of the court, to recompense him for the inconvenience of prosecuting the action.³⁷ Tested by this standard, the original judgments in the Chaltis and American Stores cases would be inadequate, but

³⁴ *Bowles v. American Stores*, 139 F. (2d) 377 (1943), cert. den. 322 U. S. 730, 64 S. Ct. 947, 88 L. Ed. 1565 (1944).

³⁵ The conference report, H. R. Rep. No. 1658, 77th Cong., 2d Sess., p. 26, does state that the statute permits an action for "... a minimum of \$50. . . ." The dissenting opinion of Associate Judge Hood in *Brown v. American Stores*, 32 A. (2d) 388 (1944), reads very much like an invocation to Congress to amend the statute, as it reiterates the idea that it is for Congress, not the courts, to grant or withhold power to exercise discretion.

³⁶ 321 U. S. 321, 64 S. Ct. 587, 88 L. Ed. 754 (1944).

³⁷ See note in 12 Geo. Wash. L. Rev. 472 at 478.

it does not follow that the desired result could only be achieved by awarding the maximum permissible penalty in all cases.

Despite this, the courts swung to the view that they had no discretion, hence an award of at least \$50 was mandatory regardless of the seller's good faith.³⁸ Support for this view was said to rest in the fact that while the word "wilfully" is used in Section 205(b) providing for criminal penalties, it is omitted from Section 205(e), thereby evidencing an intention that the presence or absence of good faith was to be immaterial. The climax of this viewpoint was reached in *Zwang v. A. & P. Food Stores*,³⁹ where the court went so far as to say that it was no defense (1) that plaintiff knew she was being charged a sum in excess of the ceiling price as the doctrine of *pari delicto* had no application, and (2) that, before the commencement of the civil action, defendant's attention having been called to the improper charge, it offered to return the excess above the ceiling price. The familiar maxim *de minimis non curat lex* has also been held inapplicable.⁴⁰

A few courts, however, have balked at such an interpretation, feeling that it would make a racket out of law enforcement.⁴¹ A complaint based on a one-cent overcharge, for example, was dismissed when the evidence disclosed that the purchase was made to secure proof of a violation rather than "for use and consumption."⁴² Much the same rationale has been applied to preclude recovery where the over-pricing had been inadvertently done by an inexperienced and incompetent clerk and the plaintiff knew of the over-price when he made the purchase but bought for the

³⁸ *Bowles v. Hasting*, 146 F. (2d) 94 (1944); *Bowles v. Franceschini*, 145 F. (2d) 510 (1944); *Bowles v. Rock*, 55 F. Supp. 865 (1944); *Brown v. Cummins Distilleries Corporation*, 53 F. Supp. 659 (1944); *Zwang v. A. & P. Food Stores*, 181 Misc. 375, 46 N. Y. S. (2d) 747 (1944); *Egling v. Lombardo*, 181 Misc. 108, 43 N. Y. S. (2d) 358 (1943). See also *Sprecher*, "Price Control Act—Recent Amendments," 43 Mich. L. Rev. 188 at 201 (1944).

³⁹ 181 Misc. 375, 46 N. Y. S. (2d) 747 (1944).

⁴⁰ *Kelly v. Gold*, 1 C. C. H. Price Control ¶51,112 (Mun. Ct., Pa., 1943). But see *Childs v. Cruise*, 1 C. C. H. Price Control ¶50,937 (Cal. Sup., 1943).

⁴¹ *Peters v. Felber*, 66 Cal. App. (2d) 1011, 152 P. (2d) 42 (1944).

⁴² *Rutkiewicz v. Great Atlantic & Pacific Tea Co.*, 1 C. C. H. Price Control ¶50,992 (Wis. Cty. Ct., 1943).

purpose of bringing suit.⁴³ Repeated purchases deliberately made only with a view to enriching the purchasers at the expense of businessmen have been criticized on the ground that Congress did not intend to enlist the help of those who were really *in pari delicto*.⁴⁴ A realistic approach to the situation, particularly where the seller deals in many thousands of articles, should lead to no other result.⁴⁵

As in the personal property cases, so in the rent cases difficulty arose, but this time out of that part of Section 205(e) which read: "For purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be." By the great weight of authority,⁴⁶ the word "rent" was interpreted to mean each separate payment made by a tenant to a landlord at a specified time for the use of the landlord's premises, as contra-distinguished from a single right to all the payments made upon a series of occasions in return for a continuous estate conveyed by him. From this, the conclusion was drawn that each separate receipt of rent in excess of ceiling was a separate "selling," giving rise to a separate statutory liability. When these successive liabilities were added together, the tenant sometimes recovered a substantial sum for a trivial overpayment, as where

⁴³ *Dunakin v. Southwestern Consumers Co-op Ass'n*, 49 N. M. 69, 157 P. (2d) 243 (1945).

⁴⁴ *Tropp v. Great Atlantic & Pacific Tea Co.*, 21 N. J. Misc. 205, 32 A. (2d) 717 (1943). In *Lane v. Fitzsimmons Stores*, 62 F. Supp. 89 (1945), the plaintiff visited about two thousand grocery stores and about seven hundred fruit and vegetable stands. He made 261 overceiling purchases at a total expenditure of \$48.91. He was overcharged \$4.48, and asked for over \$10,000 damages (221 times \$50). He claimed to be a "consumer" within the Act because he and his family had eaten the food purchased. Recovery was denied on the theory that Section 205(e) was not applicable to this self-appointed "private policeman." The court said: "There is such a thing as the Courts needing to keep themselves respectable."

⁴⁵ Even prior to amendment of the statute, the court in *Aronwald v. Sperber*, 49 N. Y. S. (2d) 257 (1944), mitigated the effect of the general doctrine as between the same buyer and seller, by limiting recovery to one penalty per schedule even though several isolated sales were proven covering numerous items under different price schedules. In *Hilgreen v. Sherman's Cleaners & Tailors*, — N. C. —, 36 S. E. (2d) 252 (1945), overcharges aggregating thirty-five cents on five items were held to justify not five \$50 penalties but only one since only one price schedule was involved.

⁴⁶ A footnote to *Gilbert v. Thierry*, in 58 F. Supp. 235 at 239, note 4, collects a large number of cases on both sides of the problem.

a judgment for \$1,900 was granted based on a \$1.00 overpayment for each of thirty-eight weeks.⁴⁷

That this interpretation worked an unwarranted hardship in some instances is well exemplified by *Gilbert v. Thierry*.⁴⁸ There, the landlord innocently and without intent to deceive reported that the premises included a refrigerator supplied by him. When his tenant moved, he bought a refrigerator from her and leased the premises to a new tenant at a monthly rental \$5.00 greater than the ceiling rental. On his attention being called to the overcharge by the Office of Price Administration, he tendered to the new tenant a check for the amount of the overcharges. The check was not cashed. Subsequently, on suit by the tenant, the landlord was held liable for the stated penalty of \$50 for each of the nine months that the overcharge had been made despite clear evidence that the landlord had acted innocently and without intent to violate the rent regulation. The landlord's argument that the transaction was a unitary single sale of a single estate, analogous to an installment sale of an automobile to be paid for in several installments, so that the successive overpayments gave rise to either one \$50 recovery or for treble the amount of the overcharge, was rejected.

It can be argued that Congress meant to impose no greater liability than \$50 or treble the overcharge, for the Senate Committee's report had stated that Section 205(e) was designed to "discourage *initial* violations."⁴⁹ If the word "initial" is restrictive, *i.e.* the penalty attaches only for the first violation, it makes good sense as the tenant, knowing that he could collect \$50 for the initial violation, would sue right away to get that sum and thereby have the rent reduced to ceiling level. If not, it would be hard to endow the word "initial" with any meaning, and would allow a sharp tenant to capitalize on his landlord's mistake, thereby enriching himself unconscionably without materially aiding the country in the battle against inflation. To

⁴⁷ *Walsh v. Gurman*, 132 Conn. 58, 42 A. (2d) 362 (1945), cert. den. sub nom. *Gurman v. Illg.* — U. S. —, 66 S. Ct. 24, 90 L. Ed. (adv.) 35 (1945).

⁴⁸ 58 F. Supp. 235 (1945), affirmed in 147 F. (2d) 603 (1945).

⁴⁹ Sen. Rep. No. 931, 77th Cong., 2d Sess., p. 8. Italics added.

interpret the section so as to hold out such great rewards for minor, unintentional overcharges served only to foster in tenants a desire to promote price violations rather than to put a stop to them, with the result that Section 205(e) operated to defeat rather than further its purpose.⁵⁰

But a literal, rigorous, and technical interpretation of the statute prior to its amendment undoubtedly led to the conclusion reached in the *Thierry* case. If the impact of the statute was upon each separate receipt of rent, as opposed to the sale of a single item of personal property where the sale was the important thing rather than the separate receipt of parts of the purchase price, then a separate penalty for each excessive rent payment was properly recoverable. The strongest contention against this view lies in the fact that the clause relating to rent payments was intended to tell *what* should create liability,⁵¹ rather than to tell the *extent* of the liability.⁵² If that clause had not been included, there could have been no treble damage action for an overpayment of rent, so there should be no sound basis for distinguishing between "sales" of real and personal property.

There are practical reasons, however, to substantiate the conclusion that each rental payment creates a separate liability in that in a term lease there would be doubt as to when the cause of action accrued and when it expired if the transaction constituted one selling.⁵³ It seems very unlikely that Congress intended that the offense should not be complete until the expiration of the tenancy when all the rent had been paid, for, if the lease extended beyond the life of the statute, to make the lease and the total payment of rent the basis of the action would render the statute wholly inoperative. Nor is it likely that the making of the first payment should warrant the imposition of a penalty equal to treble the amount of the aggregate of the overcharges likely to accrue during the entire period of the lease for, obviously, there would have been no "payment" as to the accruing rent and, on

⁵⁰ See *Peters v. Felber*, 66 Cal. App. (2d) 1011, 152 P. (2d) 42 (1944).

⁵¹ It is apparent that the right to occupy premises is not a "commodity" except for the purposes of this statute, so the payment and receipt of rent therefor would not generally be regarded as a "sale."

⁵² See a suggestion to this effect in *McCowen v. Dumont*, 54 F. Supp. 749 (1944).

⁵³ *Gilbert v. Thierry*, 58 F. Supp. 235 (1945), affirmed in 147 F. (2d) 603 (1945).

the slightest threat of suit, the landlord would reduce the rent to the ceiling level.⁵⁴ It would seem, then, that a cause of action should accrue as each successive rental payment was made, and the liability thereon expire one year later. The first action for the first overpayment would not exhaust the statutory sanction, but it is not clear whether the remainder of the sanction consists of simply waiting until the aggregate of the overcharges exceeds one-third of \$50⁵⁵ or whether each additional overceiling rent payment creates an additional \$50 liability.⁵⁶ The latter appears to be the prevailing view of the proper construction of the un-amended statute.

Several courts refused to interpret Section 205(e) in that manner, being moved, no doubt, by a desire to avoid unnecessarily oppressive penalties. Congress, they felt, could easily have included the words "for each violation" had it meant that consequence to attach.⁵⁷ Moreover, if a lease is to be regarded as a conveyance, or a month-to-month tenancy as an implied conveyance, then it could well be argued that the fact that several excessive rental payments were made would be immaterial for there would be only one "selling" of a single "commodity." While this view is in the distinct minority at the moment, it might grow under the amended statute.

The New York courts, as usual, went their own individual ways. Some ruled that the treble damage provision was penal, should be strictly construed, and did not provide for cumulative penalties, on the theory that it would take plain and unambiguous language to warrant cumulative penalties.⁵⁸ One court even

⁵⁴ This argument is expanded in *Lapinski v. Copacino*, 131 Conn. 119, 38 A. (2d) 592 (1944).

⁵⁵ A particularly clear holding to this effect is *Brooks v. Kalisiewicz*, 58 F. Supp. 648 (1945).

⁵⁶ *Gilbert v. Thierry*, 58 F. Supp. 235 (1945), affirmed in 147 F. (2d) 603 (1945), contains the best reasoning for this view.

⁵⁷ This is the *ratio decidendi* of *Ward v. Bochino*, 181 Misc. 355, 46 N. Y. S. (2d) 54 (1944). Carried to the *nth* extreme, the penalty based on a case where there was an overcharge of daily rental for a year would be 365 times \$50 or \$18,250.

⁵⁸ *Gordon v. Hochberg*, 182 Misc. 117, 49 N. Y. S. (2d) 957 (1944); *Aronwald v. Sperber*, 49 N. Y. S. (2d) 257 (1944); *Ward v. Bochino*, 181 Misc. 355, 46 N. Y. S. (2d) 54 (1944). *Contra*: *Grzybicki v. Friedman*, 269 App. Div. 368, 56 N. Y. S. (2d) 65 (1945); *Cha-Kir Realty Corporation v. Sanchez*, 183 Misc. 427, 52 N. Y. S. (2d) 482 (1944); *Kerr v. Congel*, 181 Misc. 461, 46 N. Y. S. (2d) 932 (1944).

pushed this doctrine so far as to refuse to add treble damages for several rental payments, awarding only \$50 for the initial overcharge plus the amount of the overcharges in each succeeding month not trebled.⁵⁹ This is a clearly erroneous interpretation of the statute, runs counter to an earlier correct interpretation,⁶⁰ and is manifestly opposed to the plain language of unamended Section 205(e) which specified that if the excessive charge was made the basis of computation then treble that amount should be the measure of recovery. A subsequent ruling by the Appellate Term in New York adopted the prevailing view, based on the argument that to hold otherwise would encourage every initial violator to repeat his transgression with the assurance that, in any event, he would be made to respond in damages for only one violation.⁶¹ Earlier views, including the one that the fact that there were many overceiling payments was immaterial because only one schedule was violated, were thereby repudiated.⁶²

By way of conclusion to this discussion of the unamended statute, there is room for doubt that Congress intended to impose a cumulative \$50 penalty for each receipt of rent. But the door was left open, by the words of the statute, for such an interpretation, and most courts entered through it.

B. UNDER THE AMENDED SECTION

Conflicting views as to the proper construction of the original section and a desire to distinguish between the innocent act of a bewildered citizen and the intentional overcharging of a shameless profiteer, developed pressure for an amendment of the

⁵⁹ *McGlover v. Kingswood Management*, 54 N. Y. S. (2d) 737 (1945).

⁶⁰ *Kerr v. Congel*, 181 Misc. 461, 46 N. Y. S. (2d) 932 (1944).

⁶¹ *Grzybicki v. Friedman*, 269 App. Div. 368, 56 N. Y. S. (2d) 65 (1945).

⁶² The opinion in *Grzybicki v. Friedman*, cited in the preceding note, is well and comprehensively reasoned. The authorities are well chosen, especially *Blockburger v. United States*, 284 U. S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), for the proposition that penalties may be cumulative, and *Sola Electric Co. v. Jefferson Electric Co.*, 317 U. S. 173, 63 S. Ct. 172, 87 L. Ed. 165 (1942), for the view that state law and policy must yield to the federal view in construing a federal statute. The opinion is subject to criticism, however, for an additional reason urged, i. e. that Congress intended a cumulative civil penalty for the reason that it *subsequently* said so, is contra-canonical.

statute. Congress did change the statute in this respect so that it now reads:

In such action, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than \$25 nor more than \$50, as the court in its discretion may determine: *Provided, however,* That such amount shall be the amount of the overcharge or overcharges or \$25, whichever is greater, if the defendant proves that the violation of the regulation, order, or price schedule was neither wilfull nor the result of failure to take practicable precautions against the occurrence of the violation.⁶³

As amended, the statute now makes distinction possible, even if only to a limited degree, so the present section comports more nearly with the average American's sense of justice. The door which the court, in *Hall v. Chaltis*,⁶⁴ feared would be shut has once more been opened and it is now possible to get away from a system of mechanical jurisprudence in which there was no chance of adapting the recovery to the factual situation. Comparisons as to the relative mental astuteness of the litigants which the courts indulged in,⁶⁵ notwithstanding there was no provision in the unamended section justifying it, are now permissible factors to be considered.⁶⁶

The effect of the amended statute on pending litigation was dealt with by enacting that:

insofar as it relates to actions by buyers or actions which

⁶³ 50 U. S. C. A. App. § 925(e).

⁶⁴ 31 A. (2d) 699 (Mun. Ct. of App., D. C., 1943).

⁶⁵ See *Dunakin v. Southwestern Consumers Co-op Ass'n*, 49 N. M. 69, 157 P. (2d) 243 (1945), and cases there cited.

⁶⁶ The ambiguity heretofore noted that had been created by the words "bring an action" has been eliminated by the substitution of the words "shall be liable" in 50 U. S. C. A. App. § 925(e). Precedent as to the use of the same words in the Fair Labor Standards Act, 29 U. S. C. A. § 216(b), and the construction thereof laid down in *Overnight Motor Transp. Co. v. Missel*, 316 U. S. 572, 62 S. Ct. 1216, 86 L. Ed. 1682 (1942), to the effect that such words possess mandatory effect, now settles the correct interpretation to be applied in the future.

may be brought by the Administrator only after the buyer has failed to institute an action within thirty days from the occurrence of the violation, shall be applicable only with respect to violations occurring after the date of this Act. In other cases, such amendment shall be applicable with respect to proceedings pending on the date of enactment of this Act and with respect to proceedings instituted thereafter.⁶⁷

Rights of action which had previously accrued did not abate,⁶⁸ but remained unaffected so they could go forward without any change, except that the defendants in actions brought by the Administrator, concerning purchases made in the course of trade or business, were afforded the opportunity to avail themselves of the proviso.⁶⁹ Existing appeals from final judgments favoring the Administrator were placed in the category of "pending" proceedings.⁷⁰ It should be noted, however, that actions by buyers, based on violations occurring prior to June 30, 1944, are not affected as the amendment does not apply to them,⁷¹ it being limited to violations occurring after that date.⁷²

1. *The Rent Cases*

The problem of the cumulative or non-cumulative nature of the \$50 liability for rental payments does not seem to be entirely removed by the amendment. One writer concludes that the amendment "does not in any way reduce the ambiguity of the original provision,"⁷³ and therefore still favors recovery for each rental overpayment except as it may be reduced to \$25 in the case of a non-willful overcharge. The Senate Report on the

⁶⁷ See historical note appended to 50 U. S. C. A. App. § 925.

⁶⁸ *Bowles v. Glick Bros. Lumber Co.*, 146 F. (2d) 566 (1945).

⁶⁹ *Bowles v. Franceschini*, 145 F. (2d) 510 (1944).

⁷⁰ *Bowles v. Sharp*, 149 F. (2d) 148 (1945); *Speten v. Bowles*, 146 F. (2d) 602 (1945); *Bowles v. Glick Bros. Lumber Co.*, 146 F. (2d) 566 (1945); *Bowles v. Hasting*, 146 F. (2d) 94 (1944); *Bowles v. Franceschini*, 145 F. (2d) 510 (1944). But see *Augustine v. Bowles*, 149 F. (2d) 93 (1945).

⁷¹ *Gilbert v. Thierry*, 58 F. Supp. 235 (1945), affirmed in 147 F. (2d) 603 (1945); *Walsh v. Gurman*, 132 Conn. 58, 42 A. (2d) 362 (1945); *Schloegel v. Yesso*, (La. App.) 21 So. (2d) 393 (1945); *Desper v. Warner Holding Co.*, 219 Minn. 607, 19 N. W. (2d) 62 (1945).

⁷² *Scalia v. Goldfarb*, 53 N. Y. S. (2d) 950 (1945).

⁷³ See note in 93 U. of Pa. L. Rev. 220 commenting on *Everly v. Zepp*, 57 F. Supp. 303 (1944).

amended act does not bear out that view for it states that the bill was designed to amend the law with respect to the damages which might be recovered so as to provide that the purchaser could recover only one \$50 penalty for all of the overcharges which he had paid to a given seller prior to the bringing of the suit.⁷⁴ Similar statements appear in the House Report⁷⁵ as well as in the Conference Report.⁷⁶ This legislative background would clearly seem to establish that it was the intent of Congress to subject the offender to a civil liability for each violation but to require the plaintiff either to bring successive actions for each violation as it occurs or else use one action embracing all past violations.⁷⁷ There is dicta in the case of *Bowles v. Milner Hotels, Inc.*,⁷⁸ to the effect that successive overcharges against the same tenant are not cumulative although it was there held that the Administrator might recover, in a single action, for each violation against a different tenant because the Administrator has a separate remedy for each tenant overcharged.⁷⁹

As the statutory provision directs that a judgment against the same seller shall bar any recovery based on overcharges made to the same purchaser prior to the institution of the action in which such judgment is rendered, unless a landlord is foolish enough to continue his overcharges after being sued and held liable therefor, separate minimum judgments for each overcharge are prohibited.

⁷⁴ Sen. Rep. No. 922, 78th Cong., 2d Sess., p. 13. It cites, as an example of the thing to be avoided, the case of a roomer paying rent by the day who is overcharged fifty cents a day for ten days and thereby becomes entitled to recover \$500 even though the aggregate amount of the overcharge is only \$5.

⁷⁵ Report of House Committee on Banking and Currency, No. 1593, 78th Cong., 2d Sess., p. 8.

⁷⁶ See H. R. No. 1698, 78th Cong., 2d Sess., p. 23.

⁷⁷ In such action, whether for one or more violations, plaintiff's maximum recovery is limited to three times the overcharge or \$50, whichever is greater. If the overcharge is proved to have been non-wilful and not the result of failure to take practicable precautions, the maximum liability is the greater of the overcharges or \$25. See *Kalwar v. McKinnon*, 152 F. (2d) 263 (1945); *Grzybicki v. Friedman*, 269 App. Div. 368, 56 N. Y. S. (2d) 65 (1945).

⁷⁸ 62 F. Supp. 493 (1945).

⁷⁹ Each of the seventy-four tenants there concerned could have maintained a separate suit and recovered \$25.00 each. The Administrator, after the expiration of thirty days, could have done likewise. The fact that the Administrator chose to combine all seventy-four claims in one suit should not change the measure of recovery. While an \$1850 recovery for overcharges totalling \$45.00 sounds harsh, the case is technically sound in law.

2. *Operation of the Proviso*

The present proviso was passed for the benefit and protection of the defendant-seller, but it does not come into play automatically nor is it a cure-all. He must plead the facts entitling him to the benefit of the proviso by way of answer to the complaint and prove his pleading, for the burden rests squarely on him and not on the plaintiff.⁸⁰ Moreover, he must prove *both* things, to-wit: (1) that the violation was not wilfull; and (2) that it was not the result of failure to take practicable precautions against its occurrence; for proof of one without the other is not sufficient.⁸¹ Even if the burden is sustained, the defense does not preclude all recovery,⁸² for an award of some damages is still mandatory and the court cannot withhold a judgment for the plaintiff in some amount.⁸³ As a partial defense, it may cut down the amount of the recovery, but it is not a cure-all for the "innocent" seller is, to some extent, required to do more than merely refund the overcharge. In one case, for example, there was uncontroverted testimony that, before the transaction was consummated, the seller communicated with the local office of Price Administration in an effort to ascertain the maximum price but was informed that the applicable price schedule had not been received. The sale was consummated with the understanding that if the price paid should thereafter be found to be in excess of the schedule then the excess would be refunded. A refund was duly made in accordance with such understanding, but the seller was nonetheless held liable for the amount of the overcharge.⁸⁴ The injustice of such a holding makes one shudder, but it strikingly dramatizes the fact that the proviso does not afford complete immunity even to the non-wilfull violator.

⁸⁰ *Bowles v. Krodel*, 149 F. (2d) 398 (1945); *Bowles v. Glick Bros. Lumber Co.*, 146 F. (2d) 566 (1945); *Bowles v. Superior Packing Co.*, 63 F. Supp. 12 (1945).

⁸¹ See *Bowles v. Hasting*, 146 F. (2d) 94 (1944); *Bowles v. Franceschini*, 145 F. (2d) 510 (1944), as well as cases cited in the preceding footnote. See also 90 Cong. Rec. 6449.

⁸² *Bowles v. Indianapolis Glove Co.*, 150 F. (2d) 597 (1945), cert. den. — U. S. —, 66 S. Ct. 484, 90 L. Ed. (adv.) 842 (1945); *Bowles v. Hall*, 62 F. Supp. 486 (1945).

⁸³ *Bowles v. Hasting*, 146 F. (2d) 92 (1944); *Bowles v. Hall*, 62 F. Supp. 486 (1945).

⁸⁴ *Bowles v. Hall*, 62 F. Supp. 486 (1945). See also *Trachtman v. Samit*, 62 F. Supp. 176 (1945).

Both "wilfull" and "practicable precautions" are slippery terms; their boundaries are vague and indefinite. Although both are bound to be strongly colored by the factual situations which call for their interpretation, the former is more a term of law than the latter, hence legal precedent may be of some help in interpreting it. On the one hand, it has been construed to mean "deliberate, knowing, intentional," as distinguished from "malevolent, with evil intent or purpose."⁸⁵ In *Bowles v. Krasno Bros. Glove & Mitten Company*,⁸⁶ for example, a defendant acted under a misapprehension as to the correct interpretation of a regulation, consequently did nothing to change its sales practices or avoid what was, in fact, a violation, but was nonetheless held liable for treble damages.

Akin to this view, though less stringent, is the interpretation of "wilfull" as meaning "obstinate" in contrast to "accidental." A particularly clear illustration of this interpretation is to be found in *Bowles v. Ammon*⁸⁷ where defendant claimed that certain engines which it manufactured were properly under one price regulation although the Administrator asserted they were covered by another, so had a lower ceiling price. While fully aware of the Administrator's position, defendant persisted in following the course indicated by its own views and was adjudged to be acting wilfully and forced to pay full treble damages. That case also illustrates the interrelationship between the absence of wilfulness and the taking of "practicable precautions," for the court rested its decision as much on the latter as on the former. It appeared that, both before and after the violation, defendant was notified in writing to observe the lower ceiling price, but simply disagreed with the Administrator without having even so much as the advice of counsel to rely on.

Conflicting sharply with these views is the holding of the United States Court of Appeals for the District of Columbia in the case of *Rainbow Dyeing & Cleaning Company v. Bowles*.⁸⁸ The defend-

⁸⁵ *Bowles v. Batson*, 61 F. Supp. 839 (1945); *Bowles v. Ammon*, 61 F. Supp. 106 (1945). Its use in criminal proceedings is discussed in *Zimberg v. United States*, 142 F. (2d) 132 (1944), cert. den. 323 U. S. 712, 65 S. Ct. 38, 89 L. Ed. 573 (1944).

⁸⁶ 59 F. Supp. 581 (1945).

⁸⁷ 61 F. Supp. 106 (1945).

⁸⁸ 150 F. (2d) 273 (1945).

ant there had actual notice of the Administrator's official interpretation of the regulation in question, but nonetheless refused to concede that its price changes had been in violation of the Act or that the later official interpretation was consistent with the regulation. Its violation was clearly deliberate, intentional, knowing, and obstinate within the meaning of the other cases. On motion to vacate the judgment, however, the court recognized that the regulation was capable of being honestly and reasonably understood as defendant had understood it, and concluded that if defendant, after taking all "practicable precautions" to understand the regulation, "honestly disagreed with . . . the Administrator's interpretation, and acted in accordance with [its] different interpretation in order that the question might be judicially decided, appellant was not a 'wilfull' violator of the Regulation."⁸⁹ It should be noted, in weighing the import of this case, that the decision was (1) preceded by the cautionary statement that the court could not anticipate the evidence; (2) that the case was remanded, not finally decided; (3) that the regulation concerned was ambiguous; and (4) that an OPA inspector had told defendant, after it had increased its prices and before it got the official interpretation, that its increases were lawful.⁹⁰ Whoever reads Justice Arnold's dissent at the original hearing⁹¹ cannot fail to be impressed with the multiplicity and confusing character of the "official interpretations" of the ambiguous regulation, hence would approve his conclusion that ambiguities should be construed in favor of persons who attempt in good faith to comply with the regulations.

It would appear, under this view, that there is emerging a "good faith" concept as the legal equivalent of a lack of wilfulness and the taking of proper practicable precautions, such good faith being sustained if there appears to be an honest and reasonable interpretation of the regulation. Conversely, a lack of good faith would be equivalent to wilfulness as well as a failure to take

⁸⁹ 150 F. (2d) 273 at 279.

⁹⁰ Even though the defendant did not suggest that its action was influenced by such advice or that the inspector had power to bind the OPA, this last fact colored the situation favorably to defendant.

⁹¹ 150 F. (2d) 273 at 276-9, particularly pp. 276-7.

practicable precautions.⁹² If lack of good faith is to be the only basis for imposing treble damages, a defendant would have a less heavy burden of proof in order to bring himself within the proviso than that imposed by the other cases mentioned. So, in *Smith v. Lodge*,⁹³ a landlord escaped paying treble damages by establishing non-wilfulness through evidence showing that the overcharges were "being held in escrow" pending a determination of the proper rent by the Area Rent Director.

It could be anticipated that the Administrator would bitterly contest such relaxation, and he has done so by asserting his position to be that no one could honestly and reasonably believe that a regulation meant one thing when the author of that regulation had formally and officially declared that it possessed an opposite meaning.⁹⁴ According to him, the word "wilfull" includes deliberately unlawful conduct even when engaged in under a claim of right,⁹⁵ as he not only wants his regulations to be the law but also favors endowing his interpretations thereof with divine significance.

It would seem risky, however, for a defendant to rest his defense on the fact that he honestly believed a regulation meant something different from the official interpretation where he admits knowing what that interpretation is. What he "honestly" believes is largely subjective, so he ought to be fairly sure that the regulation is "reasonably" capable of being understood as he interprets it. It would be better, perhaps, to rely on the advice of counsel

⁹² That view is echoed in *Bowles v. Jung*, 57 F. Supp. 701 (1944), and in *Duffy v. Howell*, 3 C. C. H. Price Control ¶52,518 (Cal. Super., 1945).

⁹³ 3 C. C. H. Price Control ¶52,411 (Tenn. App., 1945). See also *Kalwar v. McKinnon*, 152 F. (2d) 263 (1945).

⁹⁴ That declaration binds the Administrator without doubt: *American Teleph. & Teleg. Co. v. United States*, 299 U. S. 232, 57 S. Ct. 170, 81 L. Ed. 142 (1936). It possesses at least persuasive force: *Bowles v. Seminole Rock & Sand Co.*, 325 U. S. 410, 65 S. Ct. 1215, 89 L. Ed. 1700 (1945); *Consolidated Water Power & Paper Co. v. Bowles*, 146 F. (2d) 492 (1944); *Bowles v. Nu Way Laundry Co.*, 144 F. (2d) 741 (1944); *Goodman v. Bowles*, 138 F. (2d) 917 (1943).

⁹⁵ Reliance upon cases like *Armour Packing Co. v. United States*, 209 U. S. 56, 28 S. Ct. 428, 52 L. Ed. 681 (1908); *Arrow Distilleries v. Alexander*, 109 F. (2d) 397 (1940); *Townsend v. United States*, 95 F. (2d) 353 (1938); and *Chicago, St. Paul, M. & O. Ry. v. United States*, 162 F. 835 (1908), is not especially persuasive as it is difficult to reconcile those cases with *Spies v. United States*, 317 U. S. 492, 63 S. Ct. 364, 87 L. Ed. 418 (1943); *California v. Latimer*, 305 U. S. 255, 58 S. Ct. 1036, 83 L. Ed. 159 (1938); and *United States v. Murdock*, 290 U. S. 389, 54 S. Ct. 223, 78 L. Ed. 381 (1933).

obtained prior to the violation or as soon as a doubt arose, for there is a strong intimation in the Ammon case that this would take the violation out of the "wilfull" category.⁹⁶ Such advice may also serve as a sufficient "practicable precaution," although the ultimate in that direction would be a suit for a declaratory judgment to determine the meaning of a regulation, provided such suit is not brought for the purpose of anticipating an enforcement action. A written interpretation by the OPA together with a price adjustment in accordance therewith or in reliance thereon would also serve.⁹⁷ While unofficial advice by subordinate officials of the OPA, whether oral⁹⁸ or written,⁹⁹ is not to be relied upon as a complete and unquestionably satisfactory defense, it may be relevant and material on the question of wilfulness.¹ Other facts which undoubtedly will be weighed concern the number and complexity of the regulations or amendments; the character, reputation and capacity of the defendant; the extent of the overcharges; and any objective considerations bearing upon the defendant's intent.²

It is neither simple nor wise to try to block out and delimit

⁹⁶ In *Bowles v. Villari*, 61 F. Supp. 784 (1945), the considered opinion of counsel, after consultation with various governmental officials, that the proposed plan as to the formation of a co-operative was valid and would not violate price regulations, was held to be a mitigating factor so that defendants were liable only for the amount of the overcharge and not for treble damages.

⁹⁷ *Bowles v. Jung*, 57 F. Supp. 701 (1944), indicates that if a seller is told by an OPA representative that his prices are correct and sells on that basis before he has been advised to the contrary, he is free from both wilfulness and failure to take practicable precautions.

⁹⁸ *Schreffler v. Bowles*, 153 F. (2d) 1 (1946); *Wells Lamont Corp. v. Bowles*, 149 F. (2d) 364 (1945).

⁹⁹ *Bowles v. Indianapolis Glove Co.*, 150 F. (2d) 597 (1945), cert. den. — U. S. —, 66 S. Ct. 484, 90 L. Ed. (adv.) 842 (1945).

¹ In *Bowles v. Hansen Packing Co.*, 64 F. Supp. 131 (1946), at 134-5, the court stated: "It is true, as the Administrator contends, that he has many hundreds of employees. Nevertheless they are his employees. He can give each of them as little or as much authority as he desires. He has the right to control absolutely their conduct and if he permits them or any of them to give oral advice or information, he is then in no position to penalize a citizen because that citizen acted upon such advice, if it is afterwards determined to be erroneous. Had the defendant here followed procedural regulation No. 1 and gotten the same interpretation of the regulation it would then have been official and would have protected the defendant against any judgment of any kind in this action in the event the interpretation was erroneous, and the action were brought. The oral advice received is no defense to the defendant here against recovery for the actual amount of the overcharge, but neither can it be used for the purpose of penalizing the defendant because it accepted it as correct, and in good faith acted upon it."

² *Bowles v. Jung*, 57 F. Supp. 701 (1944); *Bowles v. Primrose Petroleum Co.*, 2 C. C. H. Price Control ¶52,207 (D. C., Tex., 1944).

what is meant by the phrase "practicable precautions," for they will vary with each particular case. The expression undoubtedly encompasses all types of precautions which a reasonably prudent business man should maintain to safeguard his business against price violations.³ Senator Chandler, author of the proviso defense, has said that reading the regulations to employees and trying to acquaint them with the regulations would be significant.⁴ It may be gathered from judicial dictum or implication that care in the selection of employees, providing them with proper instructions, establishing a system for their guidance in selling commodities at ceiling prices, and taking disciplinary action against employees found ignoring instructions, will be regarded as reasonable and practicable precautions.⁵ There is, of course, positive advantage in establishing that the overcharge was neither wilful nor the result of a failure to take practicable precautions as then it is mandatory upon the court to award not more than the amount of the overcharge or \$25, whichever is the greater.⁶

3. *Measure of Damage*

Where the seller is found to have wilfully violated the regulation, schedule, or order, and thereby violated the statute, the first problem concerns the least amount the court may allow the plaintiff to recover. Taken literally, there is no floor at all in the first part of the section, but under the reasoning of *Bowles v. American Stores, Inc.*,⁷ as well as from a reasonable interpretation of the section, it is obvious that the amount assessed may never be less than \$25, even if the overcharge is only one cent. This lack of a floor in the amended section has produced the criticism that the act is a "dismal failure" in respect to prescribing limits on a court's discretion. It is no doubt true, taken literally, that the section could lead to ridiculous results. For example, if there

³ *Bowles v. Superior Packing Co.*, 2 C. C. H. Price Control ¶52,322 (D. C., Minn., 1945).

⁴ 90 Cong. Rec. 5473.

⁵ *Bowles v. Goebel*, 58 F. Supp. 686 (1945), affirmed in 151 F. (2d) 671 (1945).

⁶ See *Bowles v. Krodell*, 149 F. (2d) 398 (1945).

⁷ 139 F. (2d) 377 (1943), cert. den. 322 U. S. 730, 64 S. Ct. 947, 88 L. Ed. 1565 (1944).

was a wilfull \$1,000 overcharge the court would have discretion to enter judgment for as little as \$25, whereas if the violation was not wilfull the judgment would have to be for at least the amount of the overcharge. That cannot be what the section really means. To avoid an anomalous result, it has been construed so that the first alternative, to-wit: "Such amount not more than three times the amount of the overcharge, or the overcharges . . . as the court in its discretion may determine," contains the implicit qualification that the lower limit of the court's discretion is the amount of the overcharge itself.⁸ That construction is supported by legislative history for the House Conferees' report read: "Under the first clause the buyer of the commodity would be entitled, of course, to recover a minimum of the overcharge, or the overcharges, for which the action is brought."⁹ Senator Wagner, Chairman of the Senate Conferees, in his report likewise said: "The minimum limits of the range are the amount of the overcharge or \$25, whichever is the greater."¹⁰

Beyond this, there is little agreement as to how the section should be construed. The Administrator divides the situations under the section into two classes, contending (1) that when the seller fails to prove that his violation was not wilfull or deliberate, he is liable for the full statutory maximum, being three times the amount of the overcharge or \$50, whichever is greater; and (2) that when the seller proves that the violation was not wilfull or deliberate, but fails to prove that he had taken practicable precautions against its occurrence, then his liability is to be determined on the basis of the degree of his fault or culpability.¹¹ For this interpretation, he relies upon the past history of the section, both judicial¹² and legislative.¹³ While the original Act, as construed, made it mandatory upon the court, regardless of the cir-

⁸ *Bowles v. Heinel Motors*, 59 F. Supp. 759 (1945); *Bowles v. Goebel*, 58 F. Supp. 686 (1945), affirmed in 151 F. (2d) 671 (1945). See also Sprecher, "Price Control Act—Recent Amendments," 43 Mich. L. Rev. 188 (1944), at p. 202.

⁹ H. R. Rep. No. 1698, 78th Cong., 2d Sess., p. 23.

¹⁰ 90 Cong. Rec. 6449.

¹¹ *Bowles v. Krodell*, 149 F. (2d) 398 (1945).

¹² Particularly *Bowles v. Franceschini*, 145 F. (2d) 510 (1944), and *Bowles v. American Stores*, 139 F. (2d) 377 (1943).

¹³ See remarks by various senators in 90 Cong. Rec. pp. 5380, 5469, 5473, 5531, 5537 and 5543. See also Sen. Rep. 922, 78th Cong., 2d Sess., p. 14.

cumstances of the case, to allow judgment for whichever was the greater of \$50 or treble the amount of the overcharges, the very purpose of the amendment was to change the Act. Prior constructions, therefore, should have little, if any, persuasive effect on how the present section is to be construed.¹⁴ One is more inclined to agree with the conclusion reached in *Bowles v. Krodell*¹⁵ that the only thing disclosed with any degree of certainty by the legislative history is that Congress intended to relieve the courts of the mandatory duty previously imposed upon them and to vest them with a discretion as to the amount of the judgment within the minimum and maximum amounts provided.

Some courts have adopted the Administrator's interpretation of the amended statute. In *Bowles v. LaCoste*,¹⁶ for example, the seller had not bothered to ascertain the correct maximum selling price for a truck though he knew the regulation was in effect. He was held to have wilfully violated the regulation and was compelled to pay three times the amount by which the consideration exceeded the ceiling. The seller in *Bowles v. Miller*¹⁷ failed to sustain the burden imposed on him by the proviso, so he was made to pay treble damages. Even partial rescission has been held insufficient to wipe out liability *pro tanto*.¹⁸

Other courts, however, have squarely rejected that interpretation. One court vested complete discretion in the fact-finding body, the jury, where the facts of violation, wilfulness, and sufficiency of practicable precautions were all in issue.¹⁹ Another held that the minimum amount of the judgment in a wilfull violation case was the amount of the overcharge.²⁰ The judgment there was rendered on the seller's default, so no evidence what-

¹⁴ It is doubtful whether statements of individual lawmakers and general debates, as distinguished from the reports, may be used to interpret the instant section: *Bowles v. Krodell*, 149 F. (2d) 398 (1945). Even if they were, most of the Administrator's references relate to statements made with respect to the proviso defense and its effect, so they are hardly applicable.

¹⁵ 149 F. (2d) 398 (1945).

¹⁶ 2 C. C. H. Price Control ¶52,208 (Ohio Mun. Ct., 1945).

¹⁷ 247 Wis. 139, 19 N. W. (2d) 285 (1945).

¹⁸ *Bowles v. Leventhal*, 61 F. Supp. 144 (1945). See also *Bowles v. Sharp*, 149 F. (2d) 148 (1945), and *Bowles v. Krasno Bros. Glove & Mitten Co.*, 59 F. Supp. 581 (1945).

¹⁹ *Bowles v. Goebel*, 58 F. Supp. 686 (1945), affirmed in 151 F. (2d) 671 (1945).

²⁰ *Bowles v. Krodell*, 149 F. (2d) 398 (1945).

ever was offered by the defendant. Under the Administrator's interpretation, the judgment in that situation should have been for at least treble the amount by which the consideration exceeded the ceiling price. Certainly, the seller should not be in a more favorable position where he offers no exculpatory evidence than he is where he offers such evidence but fails to sustain the burden. Although the court agreed with this, it refused to adopt the "novel and untenable theory, both as a matter of construction and procedure," that a defendant-seller should be in a better position where he attempts but fails to establish the proviso defense than he is where he introduces no exculpatory evidence whatever. That ruling seems to be clearly wrong for it indicates that in all cases, except where the proviso defense is established, the court is lodged with an absolutely unfettered discretion to enter any judgment it pleases provided it is for not less than \$25 and not more than three times the amount of the overcharges.²¹

The dissenting opinion in that case takes still a different position, one lying between these two extremes. It rests upon the proposition that the discretion given the court is only a sound judicial discretion to be exercised in accordance with the large objectives of the Act, so that where it appears that the defendant has been informed, before the sale, of the lawful maximum price and has thereafter deliberately sold for a price substantially in excess, his flagrant violation of the law prevents the trial court, in the exercise of a sound judicial discretion, from permitting him to get off by merely repaying the amount of the overcharge.

This view is not identical with the Administrator's view. If, for example, a defendant-seller introduced considerable evidence in the nature of excuse but which failed to establish either non-wilfulness or sufficient practicable precautions, the court might,

²¹ That is the only possible conclusion that can be drawn, for there was no evidence whatever from which the trial court could have found that there were mitigating circumstances. The opinion states that: "The Administrator makes no contention that the violation was wilful or that the court abused its discretion in allowing a judgment only for the amount of the overcharge." That statement is incorrect as the Administrator's brief urged that when there is a total absence of any showing of any mitigating circumstance discretion is abused and error committed unless the liability is fixed at the full statutory maximum. Contrary to the impression one would get from reading the opinion, the scope of discretion was in issue.

in the exercise of a sound judicial discretion, assess the damage at, say, twice the amount of the overcharge whereas, under the Administrator's interpretation, the defendant would have to pay treble damages. Under the view of the majority opinion, he might be let off for merely the exact amount of the overcharge. If choice between the differences contained in the three interpretations is possible, the preferable view would be that liability should be fixed by the exercise of a sound judicial discretion. That choice may not offer the administrative ease of the rigidly formalized rules set by the Administrator's interpretation, nor permit the court to exercise uncontrolled discretion, but it is certainly more equitable, is designed to effectuate the purposes of the statute, and should be and is gradually coming to be adopted.²² Under that view the court should hear evidence relative to the circumstances of the violation in all cases, whether the defendant relies upon the proviso defense or not. If he does, the circumstances are directly in issue. If not, the court should hear such evidence for the purpose of properly exercising its discretion.

On the point as to the amount of proof required to establish damage, there is indication that the plaintiff is not required to prove the exact amount of damages to a certainty but need offer only some reasonable basis for calculating the amount thereof, particularly where the defendant has possession of the invoices and fails to produce them.²³

4. Allowance of Attorney's Fees

Section 205(e) makes it mandatory that the successful plaintiff be permitted to recover reasonable attorney's fees. Failure to submit proof of the value of such services is not fatal to the recovery thereof,²⁴ and the court will allow them even though the attorney is requested to submit an itemized schedule of time spent

²² *Bowles v. Goebel*, 151 F. (2d) 671 (1945); *Bowles v. Batson*, 61 F. Supp. 839 (1945); *Bowles v. Superior Packing Co.*, 2 C. C. H. Price Control ¶52,322 (D. Minn., 1945).

²³ *Bowles v. Lentin*, 151 F. (2d) 615 (1945).

²⁴ *Aronwald v. Sperber*, 53 N. Y. S. (2d) 352 (1945).

and does not do so.²⁵ The attorney should, however, choose a forum which has jurisdiction to fix a fee.²⁶

The extent of the allowance lies in the discretion of the court for the section says only that it is to be "reasonable." Courts have generally tended to fix a small fee so as not to render such litigation profitable, but at the same time recognizing a minimum commensurate with the necessity of the litigation to protect the client's rights.²⁷ One court, however, has pushed this doctrine so far as to limit the amount of the fee to a sum far below the admitted worth of the services rendered.²⁸ It should be sharply criticized for such a ruling inasmuch as it is the contemplation of the statute to provide the attorney with fair compensation. "Reasonable" does not mean cheap; it means compensatory. That is the interpretation which has been placed on a substantially similar section contained in the Fair Labor Standards Act,²⁹ so that, granting there are rather wide limits on what might be regarded as reasonable, when the court expressly states that the services are obviously worth more, it ought to compensate the attorney in terms of what they are worth.

In a few cases, the attorney's fee has exceeded the amount of the recovery;³⁰ in some, it has equalled it.³¹ In most cases, how-

²⁵ *Gilbert v. Thierry*, 58 F. Supp. 235 (1944), affirmed in 147 F. (2d) 603 (1945).

²⁶ In *Hopkins v. Barnhardt*, 223 N. C. 617, 27 S. E. (2d) 644 (1943), suit brought before a justice of the peace was dismissed because, under the constitution and statutes of that state, the justice of the peace was without power to award attorney's fees.

²⁷ *Everly v. Zepp*, 57 F. Supp. 303 (1944).

²⁸ *Whatley v. Love*, (La. App.) 13 So. (2d) 719 (1943).

²⁹ 29 U. S. C. A. § 216(b). See *Overstreet v. North Shore Corp.*, 52 F. Supp. 503 (1943), affirmed sub nom. *North Shore Corp. v. Scott*, 143 F. (2d) 595 (1944); *Hargrave v. Mid-Continent Petroleum Corp.*, 42 F. Supp. 908 (1941), affirmed in 129 F. (2d) 655 (1942); *Corey v. Detroit Steel Corp.*, 52 F. Supp. 138 (1943); *Greenberg v. Arsenal Building Corp.*, 50 F. Supp. 700 (1943); *Lewis v. Nailling*, 36 F. Supp. 187 (1940); *Sykes v. Lochmann*, 156 Kan. 223, 132 P. (2d) 620 (1943), cert. den. 319 U. S. 753, 63 S. Ct. 1165, 87 L. Ed. 1707 (1943).

³⁰ *Ward v. Bochino*, 181 Misc. 355, 46 N. Y. S. (2d) 54 (1944), affirmed after reduction in attorney's fees in 268 App. Div. 814, 50 N. Y. S. (2d) 336 (1944). The recovery was for \$50, but the final attorney's fees allowed were \$150. See also *Tracfitman v. Samit*, 62 F. Supp. 176 (1945); *Stotts v. Ohler*, 1 C. C. H. Price Control ¶51,104 (Colo. City Ct., 1944); and *Hayes v. Osborn*, 2 C. C. H. Price Control ¶52,296 (Okla., 1945).

³¹ *Everly v. Zepp*, 57 F. Supp. 303 (1944).

ever, it is smaller.³² The amount of the recovery should not necessarily control the amount of the fee, although it will undoubtedly have a strong tendency to influence it. One wise practice, adopted by some trial courts, is to make the award without prejudice to the right to apply for additional counsel fees if an appeal is taken.³³

VII. CONCLUSION

The Emergency Price Control Act and the regulations promulgated thereunder together make up a novel program to guard against wartime price increases and inflation. Being of such compass as to include the entire economic life of the nation, the program required not only patriotism and good will but also vigilant enforcement. If the Administrator alone was obliged to enforce it, his staff would necessarily have had to be of enormous size. Even though aided by a large number of public-spirited volunteers, his staff was still inadequate to enforce compliance by injunctive decree or criminal prosecution. The additional sanction of the treble damage action provided by Section 205(e) has, therefore, served at least two primary purposes, namely, to induce consumers to sue sellers if they were overcharged, yet permitting the Administrator to recover if they did not.

It may be significant to note, in measuring the success of the law, that the total amount officially collected in one year for violations of the Act aggregated more than one-half of the actual cost of investigation and litigation.³⁴ From a fiscal standpoint, therefore, the action has proved a success and has far surpassed any prior use of the exemplary damage technique of enforcement.³⁵

³² *Gilbert v. Thierry*, 58 F. Supp. 235 (1944), affirmed in 147 F. (2d) 603 (1945), recovery \$450, fee \$75; *Whatley v. Love*, (La. App.) 13 So. (2d) 719 (1943), recovery \$50, fee \$25; *Kurland v. Buksan*, 55 N. Y. S. (2d) 135 (1945), recovery \$171, fee \$150; *Aronwald v. Sperber*, 53 N. Y. S. (2d) 352 (1945), recovery \$100, fee \$50; *Kerr v. Congel*, 181 Misc. 461, 46 N. Y. S. (2d) 54 (1944), recovery \$360, fee \$60.

³³ *Gilbert v. Thierry*, 58 F. Supp. 235 (1944), affirmed in 147 F. (2d) 603 (1945); *Aronwald v. Sperber*, 53 N. Y. S. (2d) 352 (1945).

³⁴ H. R. Rep. 1660, 78th Cong., 2d Sess., p. 152.

³⁵ Basis for comparison with the success attained under the Fair Labor Standards Act may be found in Ginsburg, "The Emergency Price Control Act of 1942: Basic Authority and Sanctions," 9 Law & Cont. Prob. 22 (1942), at p. 56, note 139.

While the treble damage device is not new,³⁶ it has never before been employed on such a scale. It is not surprising, therefore, that its use in connection with the price control program has been productive of substantial legal controversy. Much of that controversy is now allayed. But, as has already been noted, the amended section is still lacking in clarity on some points, so that, should the occasion ever again arise to place comparable legislation on the books, the framers thereof could well improve on the existing statute.

³⁶ Familiar prior examples are to be found in the Sherman Act, 15 U. S. C. A. § 15; the Clayton Act, 15 U. S. C. A. § 15; the patent law, 35 U. S. C. A. § 67; and the law protecting trade names, 15 U. S. C. A. § 96.